161 US 434

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 885.

THE CITY OF EVANSVILLE, PLAINTIFF IN ERROR,

vs.

WILLIAM S. DENNETT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED JANUARY 14, 1895.

(15,769.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 23, 1895.

1 UNITED STATES OF AMERICA:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1894.

Present: James G. Jenkins, circuit judge; John H. Baker, William H. Seaman, district judges.

Certificate to Supreme Court.

THE CITY OF EVANSVILLE, Plaintiff in Error,
vs.
WILLIAM S. DENNETT.

This cause came on for hearing on error to the circuit court of the United States for the district of Indiana, and having been submitted for decision, certain questions and propositions of law, among others, are found to be involved in the appeal; concerning which questions and propositions the instruction of the Supreme Court of the United States is desired:

Now, therefore, on this 27th day of November, 1894, it is ordered that the accompanying statement of facts and the following questions be certified to the Supreme Court of the United States for its opinion and instruction, to wit:

Statement of Facts.

The City of Evansville, on May 1, 1868, issued its bonds bearing date on that day, to the amount, in the aggregate, of the sum of three hundred thousand dollars, in payment of its subscription to the stock of the Evansville, Henderson & Nashville Railroad Company. Each bond was for the sum of one thousand dollars, payable to the bearer thirty years after date, with interest on presentation of the coupons attached, and each bond was of the tenor and effect following:

2 "$1,000.00. No. —.

"UNITED STATES OF AMERICA.

"*City of Evansville, State of Indiana.*

"On account of stock subscription in the Evansville, Henderson and Nashville Railroad Company.

"The City of Evansville, in the State of Indiana, promises to pay to the bearer thirty (30) years after date the sum of one thousand dollars, at the office of the Farmers' Loan and Trust Company, of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually at the office of the Farmers' Loan and Trust Company, in the city of New York, on the first day of November and the first day of May of each year, on presentation and delivery of the interest coupons hereto attached. This

being one of a series of three hundred bonds of like tenor and date issued by the City of Evansville, in payment of a subscription to the Evansville, Henderson and Nashville Railroad Company, made in pursuance of an act of the legislature of the State of Indiana and ordinances of the city council of said city, passed in pursuance thereof. The City of Evansville hereby waives all benefit from valuation or appraisement laws.

"In testimony whereof, the said City of Evansville has hereunto caused to be set its corporate seal, and these presents to be signed by the mayor of said city, and countersigned by the clerk thereof. Dated the 1st day of May, 1868.

"(Signed) WILLIAM H. WALKER, *Mayor.*

"A. M. McGRIFF, *City Clerk.*"

The City of Evansville, on December 1st, 1870, also issued its further series of bonds, amounting in the aggregate to the sum of three hundred thousand dollars, in payment of its subscription to the stock of the Evansville, Carmi & Paducah Railroad Company, each bond being dated December 1st, 1870, for the sum of one thousand dollars, payable to the Evansville, Carmi & Paducah Railroad Company, or bearer, December 1st, 1895, with interest, &c., on presentation of coupons attached, and each bond was of the tenor and effect following:

"Total amount authorized, three hundred thousand dollars.

3 "No. —. $1,000.00.

"*City of Evansville, State of Indiana.*

"Evansville, Carmi and Paducah Railroad Company.

"By virtue of an act of the General Assembly of the State of Indiana, entitled, 'An act granting to the citizens of the town of Evansville, in the county of Vanderburgh, a city charter,' approved January 27th, A. D. 1847, and by virtue of an act of the General Assembly of the State of Indiana, amendatory of said act, approved March 11th, 1867, conferring upon the city council of said city, power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4th, 1869, ordering an election of the qualified voters of said city upon the question of subscribing three hundred thousand dollars to the capital stock of the Evansville, Carmi and Paducah Railroad Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription, and by virtue of a resolution of said city council, passed May 23rd, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part), to an amount not to exceed three hundred thousand dollars, bearing interest at the rate of 7 per cent. per annum, for the purpose of paying the subscription as authorized above. The said City of Evansville hereby acknowledges to owe and promises to pay to the Evansville,

Carmi and Paducah Railroad Company, or bearer, one thousand dollars, without relief from valuation or appraisement laws, payable on the 1st day of December, A. D. 1895, at the Farmers' Loan and Trust Company, in the city of New York, with interest from the date thereof, at the rate of 7 per cent. per annum, said interest payable semi-annually on the 1st day of June and the 1st day of December, on presentation of the proper coupons for the same at said bank. The faith and credit and real estate revenues and all other resources of the said city of Evansville are hereby solemnly and irrevocably pledged for the payment of the principal and interest of this bond.

"In testimony whereof, the mayor of the city of Evansville has hereunto set his hand and affixed the corporate seal of the said city, and the city clerk of said city has countersigned these presents, this 1st day of December, 1870.

"WM. BAKER, *Mayor.*

"WM. HELDER, *City Clerk.*"

4 The city of Evansville, by its charter, approved January 27, 1847, has power, conferred upon it by the 40th clause of section 30 thereof, as follows: "To take stock in any chartered company for making roads to said city, or for watering said city, and in any company authorized or empowered by the commissioners of Vanderburgh county, to build a bridge on any road leading to said city, and to establish, maintain and regulate ferries across the Ohio river from the public wharves of said city; provided that no stock shall be subscribed, or taken, by the common council in such company, unless it be on petition of two-thirds of the residents of said city who are freeholders of the city, distinctly setting forth the company in which stock is to be taken and the number and amount of shares to be subscribed; and provided, also, that in all cases where such stock is taken, the common council shall have power to borrow money and levy and collect the taxes on all real estate (either inclusive or exclusive of improvement, at their discretion) for the payment of said stock."

This 40th clause of section 30 of the original charter of Evansville was, in form, amended by an act of the legislature of the State of Indiana, entitled "An act to amend the 40th clause of section 30 of an act entitled 'An act to grant to the citizens of the town of Evansville, in the county of Vanderburgh, a city charter' approved January 27, 1847, and declaratory of the meaning of the second section of the same." (Acts of 1865, p. 76.)

Under the decisions of the supreme court of Indiana, this act was repugnant to the Constitution and invalid, in that it did not set out the entire section as amended.

In 1867, the legislature of the State of Indiana, attempted to amend the act of 1865, above referred to, by an act entitled "An act to amend the first section of an act entitled 'An act to amend the 40th clause of the 30th section of an act entitled "An act granting to the citizens of the town of Evansville, in the county of Vanderburgh, a city charter" approved January 27, 1847, and declaratory

of the meaning of the 2nd section of the same' approved December 21, 1865," so as to authorize the common council of the city of Evansville to subscribe for and take stock in the Evansville, Henderson & Nashville Railroad Company, or any other company, or corporation, organized for the purpose of constructing a railroad leading from Nashville, in the State of Tennessee, to a point on the Ohio river at, or near, Evansville, Indiana. (Acts of 1867, p. 121.)

This is an act authorizing subscriptions for stock in the Evansville, Henderson & Nashville Railroad Company, or other railroad companies, by the city of Evansville, when a majority of the qualified voters of the city, who were also tax-payers, should vote therefor.

Under the decision of the supreme court of the State of Indiana, this latter act is invalid, because amendatory of a prior invalid act.

The bonds in question, of both series, were in fact issued in attempted compliance with the act of March 11th, 1867, above, and in the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, referred to.

The ordinances of the city council of the city of Evansville authorizing the issue of both series of bonds, disclose that they were issued pursuant to an election by the legal voters of the city of Evansville, and do not recite that any petition of resident freeholders of the city was presented to the common council, as required by the charter; and no such petition was, in fact, in either case, made or presented to the common council of the city of Evansville.

The defendant in error, William S. Dennett, purchased bonds of both issues, before maturity and for value, and is a *bona fide* holder thereof. This suit is brought upon matured coupons of both series of bonds.

Questions.

1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson & Nashville Railroad Company, that they were issued "in pursuance of an act of the legislature of the State of Indiana, and ordinances of the city council of said city, passed in pursuance thereof," put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued?

2. Does the recital in the series of bonds, issued to the Evansville, Carmi & Paducah Railroad Company, that they were issued "by virtue of a resolution of said city council, passed May 23, 1870," put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms?

3. Do the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company as against a *bona fide* purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken and the number and amount of shares to be subscribed?

6 4. Under the recitals in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company, is a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of the city of Evansville who are freeholders of the city, had been presented to the common council, before that body had subscribed for stock in said railroad company?

5. Is a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi & Paducah Railroad Company, charged by the recital in said bonds, with notice that they were issued in pursuance of an invalid act, and in pursuance of an election thereunder; or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?

JAS. G. JENKINS.
JOHN H. BAKER.
WM. H. SEAMAN.

7 United States, Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages, numbered from one to six, inclusive, contain a true copy of the certificate to the Supreme Court of the United States in the case of The City of Evansville *vs.* William S. Dennett, No. 38, October term, 1892, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 27th day of November, A. D. 1894.

Seal United States Circuit Court of Appeals, Seventh Circuit.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: Case No. 15,769. U. S. circuit court of appeals, seventh circuit. Term No., 885. The City of Evansville, plaintiff in error, *vs.* William S. Dennett. Filed January 14, 1895. (Certificate.)

Office Supreme Court, U. S.
FILED.
MAY 2 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

No. 885.

THE CITY OF EVANSVILLE,
Plaintiff in Error,
v.
WILLIAM S. DENNETT,
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE A. CUNNINGHAM,
For Plaintiff in Error.

(15,769.)

In the Supreme Court of the United States.

No. 885.

THE CITY OF EVANSVILLE,
Plaintiff in Error,
v.
WILLIAM S. DENNETT,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The United States Circuit Court of Appeals for the Seventh Circuit has certified to this court certain questions of fact and propositions of law, which are as follows:

STATEMENT OF FACTS.

The city of Evansville, on May 1, 1868, issued its bonds bearing date on that day, to the amount, in the aggregate, of the sum of three hundred

thousand dollars, in payment of its subscription to the Evansville, Henderson and Nashville Railroad Company. Each bond was for the sum of one thousand dollars, payable to the bearer thirty years after date, with interest on presentation of the coupons attached, and each bond was of the tenor and effect following:

"$1,000.00 No.....

"UNITED STATES OF AMERICA.

"CITY OF EVANSVILLE, STATE OF INDIANA.

"On account of stock subscription in the Evansville, "Henderson & Nashville Railroad Company.

"The city of Evansville, in the State of Indiana, prom- "ises to pay to the bearer thirty (30) years after date, the "sum of one thousand dollars, at the office of the Farmers' "Loan and Trust Company, of New York, with interest "thereon at the rate of seven per centum per annum, payable "semi-annually at the office of the Farmers' Loan and Trust "Company, in the city of New York, on the first day of "November and the first day of May of each year, on pre- "sentation and delivery of the interest coupons hereto at- "tached. This being one of a series of three hundred bonds "of like tenor and date issued by the city of Evansville, in "payment of a subscription to the Evansville, Henderson "and Nashville Railroad Company, made in pursuance of "an act of the Legislature of the State of Indiana and ordi- "nances of the city council of said city, passed in pursuance "thereof. The City of Evansville hereby waives all benefit "from valuation or appraisement laws.

"In testimony whereof, the said city of Evansville has "hereunto caused to be set its corporate seal, and these pres- "ents to be signed by the mayor of said city, and counter-

"signed by the clerk thereof. Dated the 1st day of May, "1868.

"Signed, WILLIAM H. WALKER,
"A. M. McGRIFF, Mayor.
"City Clerk."

The City of Evansville, on December 1st, 1870, also issued its further series of bonds, amounting in the aggregate to the sum of three hundred thousand dollars, in payment of its subscription to the stock of the Evansville, Carmi & Paducah Railroad Company, each bond being dated December 1st, 1870, for the sum of one thousand dollars, papable to the Evansville, Carmi & Paducah Railroad Company, or bearer, December 1st, 1895, with interest, &c., on presentation of coupons attached, and each bond was of the tenor and effect following:

"Total amount authorized, Three Hundred Thousand "Dollars.

"No..... $1,000.00.

"CITY OF EVANSVILLE, STATE OF INDIANA.

"EVANSVILLE, CARMI AND PADUCAH RAILROAD COMPANY.

"By virtue of an act of the General Assembly of the "State of Indiana, entitled, 'An act granting to the citizens "of the town of Evansville, in the County of Vanderburgh, "a city charter,' approved January 27th, A. D. 1847, and "by virtue of an act of the General Assembly of the State "of Indiana, amendatory of said act, approved March 11, "1847, conferring upon the city council of said city, power "to take stock in any company authorized for the purpose of "making a road of any kind leading to said city; and by

"virtue of the resolution of said city council of said city, "passed October 4th, 1869, ordering an election of the "qualified voters of said city upon the question of subscrib- "ing three hundred thousand dollars to the capital stock of "the Evansville, Carmi and Paducah Railroad Company, "and said election, held on the 13th day of November, "1868, resulting in a legal majority in favor of such "subscription, and by virtue of a resolution of said city "council, passed May 23d, 1870, ordering an issue of "the bonds of the City of Evansville (of which this is a "part), to an amount not to exceed three hundred thousand "dollars, bearing interest at the rate of 7 per cent per "annum, for the purpose of paying the subscription as "authorized above. The said city of Evansville hereby "acknowledges to owe and promises to pay to the Evans- "ville, Carmi and Paducah Railroad Company, or bearer, "one thousand dollars, without relief from valuation or "appraisement laws, payable on the 1st day of December, "A. D. 1895, at the Farmers' Loan and Trust Company, "in the City of New York, with interest from the date "thereof, at the rate of 7 per cent per annum, said "interest payable semi-annually on the 1st day of June "and the 1st day of December, on presentation of the proper "coupons for the same at said bank. The faith and credit "and real estate revenues and all other resources of the said "City of Evansville are hereby solemnly and irrevocably "pledged for the payment of the principal and interest of "this bond.

"In testimony whereof, the mayor of the City of Evans- "ville has hereunto set his hand and affixed the corporate "seal of the said city, and the city clerk of said city has "countersigned these presents, this 1st day of December, "1870.

"WM. BAKER,
Mayor.

"WM. HELDER,
City Clerk.

The City of Evansville, by its charter, approved January 27, 1847, has power, conferred upon it by the 40th clause of section 30 thereof as follows:

"To take stock in any chartered company for making "roads to said city, or for watering said city, and in "any company authorized or empowered by the Com- "missioners of Vanderburgh County, to build a bridge "on any road leading to said city, and to establish, "maintain and regulate ferries across the Ohio river, "from the public wharves of said city; provided that "no stock shall be subscribed, or taken, by the common "council in such company, unless it be on petition of two- "thirds of the residents of said city who are freeholders of "the city, distinctly setting forth the company in which "stock is to be taken and the number and amount of shares "to be subscribed; and provided, also, that in all cases "where such stock is taken, the common council shall have "power to borrow money and levy and collect the taxes on "all real estate (either inclusive or exclusive of improvement, at their discretion) for the payment of said stock."

This 40th clause of section 30 of the original charter of Evansville was, in form, amended by an Act of the Legislature of the State of Indiana, entitled "An Act to amend the 40th clause of Section 30 of an Act entitled 'An Act to grant to the citizens of the Town of Evansville, in the County of Vanderburgh, a City Charter' approved January 27, 1874, and declaratory of the meaning of the seond section of the same." (Acts of 1865, p. 76).

Under the decisions of the Supreme Court of Indiana this act was repugnant to the Constitution and invalid, in that it did not set out the entire section as amended.

In 1867, the Legislature of the State of Indiana, attempted to amend the act of 1865, above referred to, by an Act entitled "An Act to amend the first section of an Act entitled 'An Act to amend the 40th Clause of the 30th Section of an Act entitled 'An Act granting to the citizens of the town of Evansville, in the County of Vanderburgh, a City Charter, approved January 27, 1847, and declaratory of the meaning of the second section of the same, approved December 21, 1855." so as to authorize the Common Council of the City of Evansville to subscribe for and take stock in the Evansville, Henderson & Nashville Railroad Company. or any other company or corporation organized for the purpose of constructing a railroad leading from Nashville, in the State of Tennessee, to a point on the Ohio river at or near Evansville, Indiana." (Acts of 1867, p. 121).

This is an act authorizing subscriptions for stock in the Evansville, Henderson & Nashville Railroad Company, or other railroad companies, by the City of Evansville, when a majority of the qualified voters of the city, who were also taxpayers, should vote therefor.

Under the decision of the Supreme Court of the State of Indiana, this latter act was invalid, because amendatory of a prior invalid act.

The bonds in question, of both sesies, were in fact issued in attempted compliance with the Act of March 11, 1867, above, and in the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, referred to.

The ordinances of the City Council of the City of Evansville authorizing the issue of both series of bonds, disclosed that they were issued pursuant to an election by the legal voters of the City of Evansville, and do not recite that any petition of resident freeholders of the city was presented to the Common Council, as required by the charter; and no such petition was, in fact, in either case, made or presented to the Common Council of the City of Evansville.

The defendant in error, William S. Dennett, purchased bonds of both issues, before maturity and for value, and is a bona fide holder thereof. This suit is brought upon matured coupons of both series of bonds.

QUESTIONS.

1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson & Nashville Railroad Company, that they were issued "in pursuance of an Act of the Legislature of the State of Indiana, and ordinances of the City Council of said city, passed in pursuance thereof," put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued?

2. Does the recital in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company that they were issued "by virtue of a resolution of said City Council, passed May 23, 1870," put a purchaser upon inquiry as to the terms

of that resolution and charge him with knowledge of its terms?

3. Do the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, as against a bona fine purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued for stock subscribed, upon a petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken and the number and amount of shares to be subscribed.

4. Under the recitals in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company, is a bona fide purchaser for value, put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of the city of Evansville who are freeholders of the city, had been presented to the Common Council, before that body had subscribed for stock in said railroad company?

5. Is a bona fide purchaser for value of the bonds issued to the Evansville, Carmi & Paducah Railroad Company, charged by the recital in said bonds, with notice that they were issued in pursuance of an invalid act, and in pursuance of an election thereunder, or had such a purchaser a right to assume, from the recital, that the pre-requisites of both the valid act and the invalid act had been observed by the Common Council before the issuance of such bonds.

ARGUMENT.

Were there no question of estopel in the case both series of bonds set out in the record would stand upon the same footing, and both would, of course, be equally invalid.

The charter of the city of Evansville, as has been seen, required a petition of two-thirds of the resident freeholders of the city before a subscription could be made to the capital stock of a railroad, and, as stated in the record, "no such petition was in fact, in either case, made or presented to the Common Council of the city of Evansville." There being, however, two series of bonds involved in this case, and the recitals relied on as constituting the estoppel being different in the two series, two cases are presented for the consideration of the court.

The first question submitted by the court below relates to the bonds issued in aid of the Evansville Henderson & Nashville Railroad. The recital in these bonds is as follows:

> "This being one of a series of three hundred bonds of like tenor and date, issued by the City of Evansville in payment of a subscription to the Evansville, Henderson & Nashville Railroad Company, made in pursuance of an Act of the Legislature of the State of Indiana and ordinance of the City Council of said city passed in pursuance thereof."

Now, this subscription could not have been legally made except upon the petition of two-thirds of the freeholders of the city. No such petition was presented. On the contrary, such

proceedings as were taken preliminary to the issue of the bonds were pursnant to a void statute, and were wholly nugatory and void. The valid provisions of the law were wholly ignored.

The question submitted by the court is, does the recital "that they were issued in pursuance of "of an act of the legislature of the State of Indiana "and ordinances passed in pursuance thereof, put "a purchaser upon inquiry as to the terms of the "ordinances under which the bonds were issued.'

It should be borne in mind that the only act of the legislature of the State of Indiana authorizing or purporting to authorize a subscription to the capital stock of the Evansville, Henderson and Nashville Railroad Company was the act of March 11, 1867, which as shown by the certificate of the court below was wholly void.

The original charter of the City of Evansville authorized a subscription to "any chartered company for making roads to said city."

It appears from the title of the act of March 11, 1867, that the Evansville, Henderson and Nashville Railroad Company was not a company chartered for making roads to said city. As expressed in the title, this act was passed "to authorize the common council of the City of Evansville to subscribe for and take stock in the Evansville, Henderson and Nashville Railroad Company, or any other company or corporation organized for the purpose of constructing a railroad leading from Nashville, in the State of Tennessee, to a

point on the Ohio river at or near Evansville, in the State of Indiana."

Nashville and Evansville are on opposite sides of the Ohio River. The road was not to be built across, but to a point on the Ohio river at or near Evansville.

The act of 1865 is found in the acts of the called session of the general assembly of the State of Indiana for that year, at page 76. It attempts to amend the 40th clause of section 30 of the original charter by providing that no stock should be taken in any such company unless two-thirds of the resident freeholders of the city should request the Common Council in writing so to do, or unless a majority of the qualified voters who were taxpayers should vote in favor thereof at an election to be held for that purpose. Even had this act been valid aid could have been voted only to a company authorized to build a road to the city of Evansville although the condition precedent to such subscription might have been performed either by petition or selection.

The act of March 11, 1867, attempts to amend the act of 1865 by giving further authority "to subscribe and take stock in the Evansville, Henderson & Nashville Railroad Company, a corporation created by the Legislature of the Commonwealth of Kentucky, or any other company or corporation, organized under or by virtue of the laws of said Commonwealth of Kentucky for the purpose of constructing a railroad leading from Nash-

ville, in the State of Tennessee, to a point on the Ohio river at or near Evansville, Indiana." (Acts of 1867, p. 121).

It is thus seen not only from the language of the charter of the city of Evansville, but from the construction placed on this language by the Legislature itself, that the city of Evansville had no authority to subscribe to the stock of the Evansville, Henderson & Nashville Railroad Company, unless this authority was conferred by the act of 1867. This being the case the purchaser of these bonds must be presumed to have known that the act referred to was the act of 1867, for it was the only act that gave an apparent authority for their issue. The purchaser was, of course, presumed to know that this act and any proceedings had under it were void. In this view of the case the bonds were void for want of power to issue them, a question that the court below seems to have eliminated from the case.

Let us, however, leave out of the question that part of the recital which refers to the act and confine ourselves for a moment to that part which refers to "ordinances of the City Council of said city passed in pursuance thereof."

There is no intimation in the bonds as to the provisions of these ordinances. There is no suggestion that a petition of two-thirds of the freeholders of the city had been presented. The purchaser is simply referred to an act of the Legislature and ordinances passed in pursuance thereof. Is he

put upon inquiry to ascertain the provisions of these ordinances?

"The ordinances of the City Council of the city of Evansville authorizing the issue of both series of bonds disclose that they were issued pursuant to an election by the legal voters of the city of Evansville and do not recite that any petition of resident freeholders of the city was presented to the Common Council as required by the charter; and no such petition was, in fact, in either case, presented to the Common Council of the city of Evansville."

It is submitted that this question must be answered in the affirmative and that the purchaser of the bonds was put upon inquiry to ascertain the terms of the ordinances referred to. Ordinances are public records, equally accessible to all persons. They are as much so, perhaps, as statutes themselves. So far as notice of their contents is concerned, the material difference is all that persons are presumed to know of the provisions of a statute, while the existence of an ordinance is a question of fact to be proved.

If the purchaser of these bonds knew, or might by reasonable inquiry have known the provisions of these ordinances, he cannot claim to be an innocent purchaser. Did the bonds recite that a petition of two-thirds of the freeholders of the city had been presented, or had they contained other false statements that the purchaser might have relied on, then there might have been an estoppel. This, however, is not the case. The purchaser is

left to make his own inquiries as to the ordinances referred to, and if he fails so to do it is not the fault of the city.

The issue of the bonds themselves does not afford any presumption that the law has been complied with.

The court is referred to the case of Buchanan v. Litchfield, 102 U. S. 278, and especially to the following language of the court:

"The present action cannot be maintained unless we should hold that the mere fact that the bonds were issued without any recitals of the circumstances, bringing them within the limit fixed by the constitution, was in itself conclusive proof in favor of a bona fide holder that the circumstances existed which authorized them to be issued. We cannot so hold."

In the case of *Barnett v. the City of Denison*, 145 U. S. 135, this language is used:

"It is certainly a reasonable requirement that the bonds issued shall express upon their face the purpose for which they were issued. In any event it was a requirement of which the purchaser was bound to take notice, and if it appeared upon their face that they were issued for an illegal purpose they were void. If they were issued without any purpose at all appearing upon their face the purchaser took the risk of their being issued for an illegal purpose, and if that proved to be the case they are as void in his hands as if he had received them with express notice of their illegality. Ordinarily the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice that they were issued for a purpose specified in such ordinance (*Hackett v. Ottawa*, 99 U. S. 86) and the city would be estopped to show the fact to be otherwise."

Citing *Ottawa v. First National Bank of Portsmouth*, 105 U. S. 342.

In the case of *McClure v. Oxford*, 94 U. S. 429 the statute under which the bonds were issued was not to go into effect until it had been published, which was not till March 21st. The law further provided that no bonds should be issued till authorized by a majority of the votes cast at an election of which thirty days notice had been given The bonds bore date, April 15th, and contained a reference to the act under which they were issued and the result of the election. No valid notice of the election was, or could have been given between the taking effect of the act, namely March 21st, and the date of the bonds, namely April 15th. It was held that the purchaser was put upon inquiry as to the date when the statute was published and took effect; that the bonds showed on their face that the law had not been complied with. The court say:

"If a purchaser may be, as he sometimes is, protected by "false recitals in municipal bonds, the municipality ought to "have the benefit of those that are true."

It was further held that the purchaser of a detached coupon which referred to the bond was chargeable with notice of all that the bonds contained.

To quote further from the language of the court in the case last above cited:

"Every man is chargeable with notice of that which the law requires him to know, and all that which after being put

upon inquiry, he might have ascertained by the exercise of reasonable diligence."

Upon the question of estoppel the court is referred to the following authorities:

County of Bates v. Winters, 97 U. S. 83.

Dixon County v. Fields, 111 U. S. 83.

The Northwestern National Bank v. Porter Township, 110 U. S. 608.

An examination of these cases as well as of all the cases deciding questions of this kind will show that recitals in municipal bonds do not constitute an estoppel unless they are such as ought as a matter of equity and good conscience estop the municipality from denying them Had the bonds recited the fact that a petition of two-thirds of the freeholders of the city had been presented, an entirely different question would be presented, and yet it is believed that no case can be found where bonds were held valid by reason of an estoppel where there was absolutely no attempt to comply with the provisions of the law,

Upon the question as to how far the purchaser of the bonds was chargeable with notice of the contents of the ordinances referred to, the court is referred particularly to the case of *Post v. Pulaski County*, decided by the U. S. Circuit Court of Appeals for the Seventh Circuit, March 8, 1892, 1 U. S. C. C. A. 405.

We quote from the language of the court as follows:

"Without discussing all the questions made on the argument of the case, we think the record shows one so obvious ground for sustaining the judgment of the court below that no other need be considered. The bonds recite that they are issued 'pursuant to an order of the county court of said county, * * * * * * * * * * in part payment of a subscription to the capital stock of the Cairo & Vincennes Railroad Company.' This recital that the bonds were issued pursuant to an order of the county court undoubtedly put all persons dealing in the bonds on inquiry as to the terms of that order."

An examination of the order of the county court disclosed the fact that the county did not in legal effect subscribe for stock, but agreed to donate and did donate its bonds in aid of the railroad. It was held that the purchaser was chargeable with notice of this fact, and that therefore the bonds were void in his hands though an innocent purchaser for value before maturity.

It should be remembered that this is not a case where there is a mere irregularity in the manner of holding an election or in the form of the petition presented. There was not even the semblance of an attempt to comply with the law.

In the case of *Knox County v. Aspinwall*, 21 Howard, 539, so often cited on the question of estoppel, there was simply a failure to give legal notice of an election. The election itself was held in other respects as required by law.

In the case of *Steine v. Franklin County*, 48 Mo. 167, it was held that where bonds were issued where an election was required but none was ever held, and no vote was taken, the bonds were void

even in the hands of an innocent purchaser, because of want of power to issue them.

Likewise in the present case the council had no power to subscribe to stock in a railroad company until the request petition had been presented.

While the case of the Evansville, etc., Railroad Company v. the City of Evansville, 15 Ind. 395 is not directly in point, it construes the clause of the charter of the city of Evansville set out in the record and gives an opinion that is valuable on that part requiring a petition of two-thirds of the freeholders. We quote from the opinion of the court, on page 411, as follows:

"The Common Council would have no power to subscribe at all in the absence of the petition provided for in the charter of the city; but when the power to subscribe is conferred by the petition, the mode in which it is to be exercised must be left, in a measure, to the discretion and judgment of the Common Council."

Also on page 420, as follows:

"And here we may remark that we are not called upon to decide whether the Common Council (if such case were supposable) could in the absence of any petition on the subject, by an order or resolution declaring that such petition had been laid before them, signed by the requisite number of the proper persons, conclude the city. In such case there would be nothing before the Council upon which to act. No question would be presented for their determination. There would be nothing to call forth the exercise of the power vested in them of determining upon the sufficiency of the petition, in respect to the number and qualifications of the petitioners."

Here the Common Council had not even declared that such petition had been laid before them.

This decision was rendered in 1860, long before the issue of the bonds involved in the present controversy, and even if it cannot be held to be conclusive as an authority, it is certainly entitled to great weight.

The plaintiff in error insists that there is one element necessary to create an estoppel in cases of this kind that is wholly wanting. It is settled by the authorities that in order to estop a municipality from setting up the fact that the provisions of the law have not been complied with, it must have been determined by the tribunal appointed by law to determine the matter that the requirements of the law have been met.

2 Dillon Municipal Corporation, §524.

Coloma v. Eaves, 92 U. S. 484.

Dixon County v. Field, 111 U. S. 83.

It is also settled that under the charter of the city of Evansville the Common Council is the tribunal appointed by law to make this decision.

Bissell v. Jeffersonville, 24 How. 287.

Commissioners of Knox County v. Aspinwall, 21 How. 539.

Evansville, etc., R. R. Co. v. City of Evansville, 15 Ind. 395.

In the last case the language used by the court is as follows:

"The question arises, whose duty was it to determine "whether the requisite number of the free-holders of the city "had petitioned for the subscription? We think it clear that "that duty pertained to the Common Council, no other "tribunal having been provided for that purpose."

In *Bissell v. Jeffersonville supra*, this language is used by the court:

"Jurisdiction of the subject matter on the part of the "Common Council was made to depend upon the petition as "described in the explanatory act, and of necessity there "must be some tribunal to determine whether the petition-"ers whose names were appended constitute three-fourths of "the legal voters of the city; else the board could not act at "all. None other than the common ceuncil to whom the "petition was required to be addressed is suggested, either "in the charter or the explanatory act, and it would be dif-"ficult to point out any other sustaining a similar relation to "the city so fit to be charged with the inquiry, or one so "fully possessed of the necessary means of information to "discharge the duties."

The Common Council of the city of Evansville was, therefore, the tribunal to whom was committed the duty of determining whether or not a petition of two thirds of the freeholders of the city had been presented. This being the case, no officer or department, of the city, except the Common Council, could do anything that would create an estoppel on this question. This is perfectly plain from the authorities above cited.

The Common Council of the city of Evansville, never did in any manner, directly or indirectly, decide that a petition of two-thirds of the freeholders of the city had been presented.

"The ordinances of the city council of the City of Evansville authorizing the issue of both series of bonds disclose that they were issued pursuant to an election of the legal voters of the City of Evansville, and do not cite that any petition of resident freeholders of the city was presented to the Common Council as required by the charter; and no such petition was in fact, in either case, made or presented to the Common Council of the city of Evansville." Record, page 4.

The bonds themselves are signed by the mayor and clerk. Neither of these officers could by any act of his own dispense with the action of the Common Council. The only authority that either of these officers had, or could have had, was such as they derived from the act of the city council. The duties of the mayor are defined in sections 24 and 63 of the act of January 27, 1847, granting to the citizens of the town of Evansville a city charter. See local laws of 1846–7, page 3. A copy of these sections is appended hereto. In neither of these actions is any authority given to the mayor to determine matters of this kind. In section 24 it is provided that the mayor and council shall constitute the Common Council of the city. The mayor presides over meetings of the council and votes on questions when there is a tie vote, except in making laws and ordinances he shall have no vote under any circumstances. Section 63 defines at length the duties of mayor. In this section among other things it is provided as follows:

"He shall have such powers and discharge all such duties as shall be lawfully given to, or imposed upon him by the Common Council, or by their ordinances."

It is, therefore, perfectly clear that the authority of the mayor and city clerk for the execution of the bonds involved in this case must have been derived from the Common Council. It is a general rule of law that the president of a corporation has no authority to execute commercial paper unless especially authorized by the board of directors. It is readily seen that the reasons for restricting the authority of the head of a municipal corporation are much stronger.

The purchaser of the bonds was of course presumed to know that the authority of the mayor was derived from the Common Council. Indeed, on the face of the bonds he is referred to the ordinances, an inspection of which would have revealed the fact that the bonds were not issued as required by law.

It is not supposable for a moment that the purchaser of these bonds really believed that a petition of two-thirds of the freeholders of the city had been presented. He had no reason of any kind to so believe. On the contrary, if he so took the trouble to consider the matter at all, he no doubt supposed that the election referred to in the proceedings of the Common Council were sufficient.

Not only is the purchaser of the bonds in the present case put upon inquiry to ascertain the terms of the ordinances referred to, but every principle of equity and fair dealing requires that he should be. There are no false statements of any kind in the bonds. They simply refer to the

ordinances, and the purchaser knew, or is presumed to have known, that the Common Council was the only tribunal that could bind the city in a matter of this kind, and that therefore these ordinances were vital factors in determining the validity of the bonds.

This brings us to the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, which are as follows:

"By virtue of an act of the General Assembly of the State of Indiana, entitled, 'An act granting to the citizens of the town of Evansville, in the county of Vanderburgh, a city charter,' approved January 27th, A. D. 1847, and by virtue of an act of the General Assembly of the State of Indiana, amendatory of said act, approved March 11th, 1867, conferring upon the city council of said city, power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4th, 1869, ordering an election of the qualified voters of said city upon the question of subscribing three hundred thousand dollars to the capital stock of the Evansville, Carmi and Paducah Railroad Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription, and by virtue of a resolution of said city council, passed May 23d, 1870, ordering an issue of the bonds of the City of Evansville, (of which this is a part), to an amount not to exceed three hundred thousand dollars, bearing interest at the rate of 7 per cent. per annum, for the purpose of paying the subscription as authorized above."

It is seen that these recitals refer to several distinct matters, as follows:

First, the act of the General Assembly of the State of Indiana of 1847, granting to the citizens of Evansville a city charter.

Second, the act of 1867 amendatory thereof.

Third, the resolution of the Common Council of the City of Evansville, of October 4th, 1869, ordering an election.

Fourth, the election held in pursuance of this resolution, and,

Fifth, the resolution ordering the bonds.

The reference to the original charter of the City of Evansville cannot in this case be construed to mean that the requirement contained therein, that a petition of two-thirds of the freeholders had been presented. Even supposing that the act of 1867 was valid, the only material change in the charter made by it was to provide for an election instead of a petition. Except in so far as the act of 1867 attempted to change the provisions of the original charter they remained as they were before, and of course whether the matter was brought to the Common Council by way of petition or election these provisions must be observed. Coupled with the reference to the act of 1867 the reference to the act of 1847 must be held to apply only to those provisions of the original charter not in conflict with the act of 1867. The original charter required a petition of two-thirds of the freeholders. The act of 1867 required a majority of the qualified voters. The meaning plainly is that the bonds were issued in pursuance of the charter, except in

so far as its terms were changed by the act of 1867, and that as to the changed conditions the latter act had been followed. This would be the reasonable inference if nothing followed the first two recitals. The meaning however, is made perfectly plain by the recitals which follow. "And by virtue of the resolution of said city council of said city, passed October 4th, 1869, *ordering an election of the qualified voters of said city*," etc., and "said election held on the 13th day of November, 1868"

It is perfectly clear from reading the bonds thatthe only authority relied on for their issue was the election. There is no intimation, not even an inference, that anything else had been done. What is there on the face of these bonds to imply that a petition of two-thirds of the freeholders had been presented? Had a purchaser the right to assume that, notwithstanding these explicit recitals, something entirely different had been done? If he might reject the specific statement of fact and substitute something not at all in the contemplation of the parties, then it is difficult to conceive of a case where the purchaser is put upon inquiry. If the specific controls the general, if the mention of the one is the exclusion of the other, then he was bound to know that the common council had followed the void act in ordering and holding an election instead of requiring the necessary petition.

Four questions are submitted relative to this series of bonds. The first is as follows:

"Does the recital in a series of bonds, issued to the "Evansville, Carmi and Paducah Railroad Company, that "they were issued 'by virtue of a resolution of said city coun- "cil, passed May 23d, 1870,' put a purchaser upon inquiry "as to the terms of that resolution and charge him with "knowledge of its terms."

It is not considered necessary to argue this question further than has been already been done in discussing the question submitted on the other series of bonds, except to refer to the fact that the recital mentioned specifically the ordinance referred to by giving its date.

The next question is as follows:

"Do the recitals in the bonds issued to the Evansville, "Carmi and Paducah Railroad Company as against a *bona* "*fide* purchaser for value of such bonds, estop the city of "Evansville from asserting that such bonds were not issued "for stock subscribed upon a petition of two-thirds of the "residents of said city, who are freeholders of the city, dis- "tinctly setting forth the company in which stock is to be "taken and the number and amount of shares to be sub- "scribed?"

This involves the question of estoppel by reason of recitals in municipal bonds, which has already been briefly noticed. In considering the numerous decisions on this proposition it should not be lost sight of that, confessedly, these bonds were issued in absolute defiance of the provisions of law, there being not even the semblance of an attempt to comply therewith, and the holder is to recover, if at all, on the ground that the city of Evansville has done something that ought now to estop it from setting up the facts.

It is instructive at the outset to consider what an estoppel is.

"Now if the misrepresentation was of a trifling or immaterial thing, or if the party alleging it did not in fact trust in it, or was not misled by it, or if it was vague and inconclusive in its nature, or if it was upon a matter of opinion or fact equally open to the knowledge of both parties, and in regard to which neither could be presumed to trust the other —in these and the like cases it is said that equity will not grant relief."

Bigelow on Estoppel (2d ed.) 431.

As applied to municipal bonds this court has repeatedly defined what constitutes an estoppel.

In *St. Joseph Township v. Rogers*, 16 Wall, 644, this language is used:

"Bonds payable to bearer issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the Legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the Legislature to grant such aid, they are invalid even in the hands of innocent holders. Such power is frequently conferred to be exercised in a special manner or subject to certain regulations, conditions or qualifications. But if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the Legislature, and that the bonds were issued in conformity with its regulations, and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defense to a corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which it is alleged was not fulfilled."

In *Knox County v. Aspinwall*, 21 How. 539, the following:

"Another answer to this ground of defense is that the purchaser of the bonds had the right to assume that the vote of the county, which was made a condition of the grant of the power, had been obtained from the fact of the subscription by the board to the stock of the railroad company and the issue of the bonds. The bonds on their face import a compliance with the law under which they were issued. 'This bond,' we quote, 'is issued in part payment of a subscription of two hundred thousand dollars by the said Knox County to the capital stock, etc., by the order of the Board of Commissioners, in pursuance of the third section of the act, etc, passed by the General Assembly of the State of Indiana and approved January 15, 1849.' The purchaser was not bound to look further for evidence of a compliance with the conditions of the grant of the power.'

As has been observed, the defense relied on in this case was simply the failure to give notice of the election.

In *Oregon v. Jenkins*, 119 U. S. 74, occurs the following:

"The supervisor and town clerk were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting against a bona fide holder that the conditions described by the popular vote were not complied with."

In the *Independent School District vs. Stone*, 106 U. S., 183, Justice Harlan states the doctrine thus:

"Numerous cases have been determined in this court in which we have said that where a statute confers power upon

a municipal corporation upon the performance of certain precedent conditions to execute bonds in the aid of the construction of a railroad, or for other like purpose, and imposes upon certain officers invested with authority to determine whether such conditions have been performed, the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued 'in pursuance of' or 'in conformity with' or 'by virtue of' or 'by authority of' the statute have been held in favor of *bona fide* purchasers for value to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions were performed before the bonds were issued. But in all such cases, as a careful examination will show, the recitals fairly imported a compliance in all substantial respects with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule now established by a long line of decisions. Sound public policy forbids that we should do so. Where the holder relies for protection upon the mere recitals, they should at least be clear and unambiguous in order to estop a municipal corporation in whose name said bonds have been made from showing that they were issued in violation of or without authority of law."

These cases state the rule perhaps as strongly in favor of the bondholder as any cases that can be found. As indicated by the language of the court in the latter cases there is no disposition to enlarge or extend the rule. Throughout the entire line of decisions on this subject the idea is made prominent that the officers of the city act merely as agents or representatives of the people at large. Their agency is not general, but is special and limited. It is defined by the law, and all persons dealing with municipal corporations

"Under the recitals in the series of bonds issued to the "Evansville, Carmi and Paducah Railroad Company, is a "*bona fide* purchaser for value put upon inquiry to ascertain "whether a proper petitition of two-thirds of the residents of "the City of Evansville who are freeholders of the city, had "been presented to the common council, before that body "had subscribed for stock in said railroad company?"

"Is a *bona fide* purchaser for value of the bonds issued "to the Evansville, Carmi and Paducah Railroad Company, "charged by the recital in said bonds, with notice that they "were issued in pursuance of an election thereunder; or "had such a purchaser a right to assume, from the recital, "that the prerequisites of both the valid act and the invalid "act had been observed by the common council before the "issuance of such bonds?"

A determination of the questions already discussed will practically determine the answer to these questions, and no especial reference to them is deemed necessary.

The decisions of this court cover so wide a field, and such a variety of cases that but few references have been made to decisions of state courts. It is manifest from the more recent utterances of the court that there is no disposition to extend the rule further in favor of the holders of municipal bonds. Viewed in this light of all the decisions it is insisted that there is nothing in either of the series of bonds in this case that estops the plaintiff in error from availing itself the defense relied on.

The purchaser was put upon inquiry to ascertain the terms of the ordinances and resolutions referred to, and the questions submitted should be answered accordingly.

GEORGE A. CUNNINGHAM,
For Plaintiff in Error.

Sections 24 and 53, of an Act granting to the Citizens of the Town of Evansville, in the County of Vanderburgh, a City Charter.

Approved January 27, 1847.

SEC. 24. The mayor and councilmen, elected and qualified as herein required, shall constitute the Common Council of the City of Evansville, but a majority of the whole number shall be at all times necessary to constitute a quorum for the transaction of business. They shall be judges of the election returns, and of the qualifications of their own members; shall determine the rules of their own proceedings, and keep a record thereof, which shall be open to the examination of every citizen, and may compel the attendance of absent members of the council, in such a manner and under such penalty as they shall by law and order establish and order prescribe. The mayor, when present, shall preside at all meetings of the Common Council, and in case of a tie on any question or proposition, shall give the casting vote, except that in making laws and ordinances he shall have no vote, under any circumstances, nor in any other case, except where there is a tie. In the abscence of the mayor, the councilmen shall elect one of their own body to preside for the time being, who, as President, shall possess the same power as the mayor, while acting in that capacity, and the additional power of voting on all questions whether there is a tie or not.

SEC. 63. The mayor shall cause laws and ordinances, rules and regulations, made in pursuance to this act, to be duly observed, enforced and executed, inspect the conduct of all officers and agents appointed by the Common Council, and cause all negligence, carelessness and positive violation of duty by them to be promptly punished. He shall keep the seal of the city, and sign all licenses, permits and com-

missions, which may be granted by (him) or by authority of the Common Council. He shall keep an office in some convenient place in the city, and shall have power, as a mayor, to take and certify, under the corporate seal of the city, all acknowledgements and proofs of deeds of conveyances, powers of attorney, and all other deeds and instruments of writing, according to the laws and usages in such cases; also, to take and certify depositions and affidavits in all cases whatever, and deeds and other instruments of writing, and depositions and affidavits acknowledged or taken before him as aforesaid, and certified under the corporate seal of the city, shall be received as evidence, without further authentication, in all courts and places, in like manner and with the same effect as if the said acknowledgements, affidavits, proofs and depositions had been taken and certified by any other officer authorized by law to take and certify the same. He shall have such powers and discharge all such duties as shall be lawfully given or imposed upon him by the Common Council, or by their ordinances. The mayor shall also, as mayor, be a judicial officer, and, as such, shall have exclusive original jurisdiction to hear and determine all suits, actions and legal proceedings for the violation of any ordinance or ordinances, rules or regulations of said city, and for that purpose to cause witnesses and jurors to be summoned, and compel them to attend in the same manner and under like circumstances as Justices of the Peace have or may have power to do, and to punish contempts committed by attorneys, witnesses, parties, jurors and other persons in the same way, and to the same extent as Justices of the Peace have or may have power to punish the same. He shall also have power to issue final process, and compel the payment of judgments and costs on his docket in the same manner as Justices of the Peace are or may be authorized to compel the payment of judgment rendered by the Mayor in any such action or suit as is above in this section mentioned, an appeal may be taken to the Circuit Court of

Vanderburgh County at any time within ten days after the rendition thereof, in the same manner and subject to the rules and restrictions, and with the same effect that appeals are taken in like cases from judgments of Justices of the Peace. In the trial of causes the Mayor shall be governed by the same rules which shall for the time being govern Justices of fhe Peace. The Mayor shall, *ex officio*, be a Justice of the Peace, and as such shall, within said city, have and exercise the same powers and jurisdiction in all civil and criminal cases that other Justices of the Peace shall for the time being have or may lawfully exercise within their respective townships, and he shall, also, be subject to the same responsibilities and perform the same duties as other Justices of the Peace. Before entering upon the discharge of his duties in his judicial capacity, he shall also give bond, payable to the State of Indiana, in like manner and in the same penalty as Justices of the Peace (may) at the time of his election, be required to, and when acting in his judicial capacity, he shall be entitled to the same fees as Justices of the Peace are or my be entitled to for like services, and in addition thereto he shall receive annually a salary to be fixed by ordinance or by law, and paid out of the city treasury by quarter-yearly installments, and after the first ordinance fixing such salary shall take effect and be in force, no ordinance decreasing such salary shall take effect and be in force, no ordinance decreasing such salary shall take effect until the next regular election for mayor, or until the office of mayor shall become vacant. The mayor shall sign or sign and seal (as the case may be) all process issued by him in the same manner that Justices of the Peace sign or sign and seal process of the same kind issued by them. He shall also, when required by any person interested, his agent or attorney, give certified transcripts of judgments and proceedings on his docket, which shall be received in evidence in like manner as certified transcripts of the judgments of Justices of the Peace,

and when properly recorded in the clerk's office, shall bind and be a lien on real estate in the same manner that transcripts of the judgments of Justices of the Peace do, and for such and other services of a ministerial character relating to his business as a judicial officer, the mayor shall receive the same fees as Justices of the Peace receive for like services at the time such services are rendered. The mayor shall keep a docket such as Justices of the Peace are required to keep, and such other books and records as by law or the ordinances of the Common Council he may be required to keep; and in case of the absence of the mayor, or in case of his sickness or inability to act, he shall deposit his docket with some Justice of the Peace who resides and keeps his office in said city, who shall, during such absence, sickness or inability of the mayor, be vested with an exercise and perform all the powers and duties of the mayor in his judicial capacity, and shall act upon his docket and upon any new case arising under the ordinances of the city as if he were mayor. Actions against the mayor himself, for violations of the ordinances of the city, may be commenced and prosecuted before any Justice of the Peace in said city, and when it shall be made to appear, by affidavit filed with the mayor, that he is a material and competent witness in any case pending before him in which, as mayor, he has exclusive original jurisdiction, he shall grant a change of venue in such case, to and before some disinterested Justice of the Peace of said city, who shall have full power and authority to hear and determine the same as it he were mayor, and such change shall be effected and all subsequent proceedings had in the same manner and subject to the same rules and restrictions as changes of venue from one Justice of the Peace to another; *Provided*, that the City of Evansville shall not be required to pay or secure or suffer judgment for cost in order to procure such change. In case of a vacancy in the office of mayor, the Common Council shall cause the mayor's docket to be placed in the hands of some Justice of the Peace of

the city, or of Vanderburgh County, who shall, from the time such docket is placed in his hands, be invested with all the judicial powers of the Mayor, and continue to serve as such until such vacancy is supplied. All constables shall be ministerial officers of the mayor's court in like manner as they are in Justice's courts, and shall be bound in the same manner to execute the process issued by him. The mayor may from time to time be required to give additional bond and security, and may be removed from office in the same manner and for the same cause that Justices of the Peace may be.

Office Supreme Court, U. S.
FILED.
JAN 14 1895
JAMES H. McKENNEY,
CLERK.

IN THE

United States Supreme Court,

OCTOBER TERM, A. D. 1894.

No. 885

THE CITY OF EVANSVILLE,
Plaintiff in Error.

—VS—

WILLIAM S. DENNETT,
Defendant in Error.

Questions Certified and Statement of Facts by the United States Circuit Court of Appeals, For the Seventh Circuit,

AND

Brief and Argument for Defendant in Error.

GEORGE A. SANDERS.
For Defendant in Error.

WM. R. BOWERS.
Of Counsel.

TALBOTT & HAMANN, PRINTERS, SPRINGFIELD, ILL.

Statement of Facts and Questions Certified by the Court below and Argument of Defendant in Error.

UNITED STATES OF AMERICA.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, 1894.

Present:—JAMES G. JENKINS, Circuit Judge.
JOHN BAKER,
WILLIAM H. SEAMAN, District Judges.

CERTIFICATE TO SUPREME COURT.

The City of Evansville,
Plaintiff in Error,
vs.
William S. Dennett.

This cause came on for hearing on error to the Circuit Court of the United States for the District of Indiana, and having been submitted for decision, certain questions and propositions of law, among others, are found to be involved in the appeal; concerning which questions and propositions the instruction of the Supreme Court of the United States is desired.

Now, therefore, on this 27th day of November, 1894, it is ordered that the accompanying statement of facts and the following questions be certified to the Supreme Court of the United States for its opinion and instruction, to-wit:

STATEMENT OF FACTS.

The City of Evansville, on May 1, 1868, issued its bonds, bearing date on that day, to the amount, in the aggregate, of the sum of three hundred thousand dollars, in payment of its subscription to the stock of the Evansville, Henderson & Nashville Railroad Company. Each bond was for the sum of one thousand dollars, payable to the bearer thirty years after date, with interest on presentation of the coupons attached, and each bond was of the tenor and effect following:

"$1,000.00 No.....

"UNITED STATES OF AMERICA.

"City of Evansville, State of Indiana.

"On account of stock subscription in the Evansville, "Henderson & Nashville Railroad Company.

"The City of Evansville, in the State of Indiana, promises "to pay to the bearer thirty (30) years after date the sum "of one thousand dollars, at the office of the Farmers' Loan "and Trust Company, of New York, with interest thereon "at the rate of seven per centum per annum, payable semi-"annually at the office of the Farmers' Loan and Trust "Company, in the City of New York, on the first day of "November and the first day of May of each year, on pre-"sentation and delivery of the interest coupons hereto

"attached This being one of a series of three hundred "bonds of like tenor and date issued by the City of Evans- "ville, in payment of a subscription to the Evansville, Hen- "derson & Nashville Railroad Company, made in pursuance "of an act of the Legislature of the State of Indiana and "ordinances of the city council of said city, passed in pur- "suance thereof. The City of Evansville hereby waives all "benefit from valuation or appraisement laws.

"In testimony whereof, the said City of Evansville has "hereunto caused to be set its corporate seal, and these "presents to be signed by the mayor of said city, and "countersigned by the clerk thereof. Dated the first day of "May, 1868.

"Signed WILLIAM H. WALKER,
Mayor.

"A. M. MCGRIFF,
City Clerk."

The City of Evansville, on December 1st, 1870, also issued its further series of bonds, amounting in the aggregate to the sum of three hundred thousand dollars, in payment of its subscription to the stock of the Evansville, Carmi & Paducah Railroad Company, each bond being dated December 1st, 1870, for the sum of one thousand dollars, payable to the Evansville, Carmi & Paducah Railroad Company, or bearer, December 1st, 1895, with interest &c., on presentation of coupons attached, and each bond was of the tenor and effect following:

"Total amount authorized, Three Hundred Thousand "Dollars.

"No..... $1,000.00

"City of Evansville, State of Indiana.

"Evansville, Carmi and Paducah Railroad Company.

"By virtue of an act of the General Assembly of the "State of Indiana, entitled, 'An act granting to the citizens "of the town of Evansville, in the County of Vanderburgh, a "city charter,' approved January 27th, A. D. 1847, and by "virtue of an act of the General Assembly of the State of "Indiana, amendatory of said act, approved March 11th, 1867, "conferring upon the city council of said city, power to take "stock in any company authorized for the purpose of making a "road of any kind leading to said city; and by virtue of the reso- "lution of said city council of said city, passed October 4th, "1869, ordering an election of the qualified voters of said "city upon the question of subscribing three hundred thou- "sand dollars to the capital stock of the Evansville, Carmi "and Paducah Railroad Company, and said election, held on "the 13th day of November, 1868, resulting in a legal ma- "jority in favor of such subscription, and by virtue of a "resolution of said city council, passed May 23d, 1870, order- "ing an issue of the bonds of the City of Evansville (of "which this is part), to an amount not to exceed three hun- "dred thousand dollars, bearing interest at the rate of 7 per "cent. per annum, for the purpose of paying the subscrip- "tion as authorized above. The said City of Evansville "hereby acknowledges to owe and promises to pay to the "Evansville, Carmi and Paducah Railroad Company, or bearer,

"one thousand dollars, without relief from valuation or ap-
"praisement laws, payable on the 1st day of December, A.
"D. 1895, at the Farmers' Loan and Trust Company, in the
"City of New York, with interest from the date thereof, at
"the rate of 7 per cent. per annum, said interest payable
"semi-annually on the 1st day of June and the 1st day of
"December, on presentation of the proper coupons for the
"same at said bank. The faith and credit and real estate
"revenues and all other resources of the said City of Evans-
"ville are hereby solemnly and irrevocably pledged for the
"payment of the principal and interest of this bond.

"In testimony whereof, the mayor of the City of Evans-
"ville has hereunto set his hand and affixed the corporate
"seal of the said city, and the city clerk of said city has
"countersigned these presents, this 1st day of December,
"1870.

"WM. BAKER,
Mayor.

"WM. HELDER,
City Clerk."

The City of Evansville, by its charter, approved January 27, 1847, has power, conferred upon it by the 40th clause of section 30 thereof, as follows: "To take stock in any char-
"tered company for making roads to said city, or for water-
"ing said city, and in any company authorized or empowered
"by the Commissioners of Vanderburgh County, to build a
"bridge on any road leading to said city, and to establish,
"maintain and regulate ferries across the Ohio river from
"the public wharves of said city; provided that no stock

"shall be subscribed, or taken, by the common council in "such company, unless it be on petition of two-thirds of the "residents of said city who are freeholders of the city, dis- "tinctly setting forth the company in which stock is to be "taken and the number and amount of shares to be sub- "scribed; and provided, also, that in all cases where such "stock is taken, the common council shall have power to "borrow money and levy and collect the taxes on all real "estate (either inclusive or exclusive of improvements, at "their discretion) for the payment of said stock."

This 40th clause of section 30 of the original charter of Evansville was, in form, amended by an Act of the Legislature of the State of Indiana, entitled "An Act to amend the 40th Clause of Section 30 of an Act entitled 'An Act to grant to the citizens of the Town of Evansville, in the County of Vanderburgh, a City Charter,' approved January 27, 1847, and declaratory of the meaning of the second section of the same. (Acts of 1865, p. 76.)

Under the decision of the Supreme Court of Indiana, this act was repugnant to the Constitution and invalid, in that it did not set out the entire section as amended.

In 1867, the Legislature of the State of Indiana, attempted to amend the act of 1865, above referred to, by an Act entitled "An Act to amend the first Section of an Act entitled 'An act to amend the 40th Clause of the 30th Section of an Act entitled an 'An Act granting to the citizens of the Town of Evansville, in the County of Vanderburgh, a City Charter,' approved January 27, 1847, and declaratory of the

meaning of the 2d Section of the same,' approved December 21, 1865," so as to authorize the Common Council of the City of Evansville to subscribe for and take stock in the Evansville, Henderson & Nashville Railroad Company, or any other company, or corporation, organized for the purpose of constructing a railroad leading from Nashville, in the State of Tennessee, to a point on the Ohio river at, or near, Evansville, Indiana." (Acts of 1867, p. 121.)

This is an act authorizing subscriptions for stock in the Evansville, Henderson & Nashville Railroad Company, or other railroad companies, by the City of Evansville, when a majority of the qualified voters of the city, who were also taxpayers, should vote therefor.

Under the decision of the Supreme Court of the State of Indiana, this latter act is invalid, because amendatory of a prior invalid act.

The bonds in question, of both series, were in fact issued in attempted compliance with the Act of March 11th, 1867, above, and in the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, referred to.

The ordinances of the City Council of the City of Evansville authorizing the issue of both series of bonds, disclose that they were issued pursuant to an election by the legal voters of the City of Evansville, and do not recite that any petition of resident freeholders of the city was presented to the Common Council, as required by the Charter; and no

such petition was, in fact, in either case, made or presented to the Common Council of the City of Evansville.

The defendant in error, William S. Dennett, purchased bonds of both issues, before maturity and for value, and is a bona fide holder thereof. This suit is brought upon matured coupons of both series of bonds.

QUESTIONS.

1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson & Nashville Railroad Company, that they were issued "in pursuance of an Act of the Legislature of the State of Indiana, and ordinances of the City Council of said city, passed in pursuance thereof," put a purchase upon inquiry as to the terms of the ordinance under which the bonds were issued?

2. Does the recital in the series of bonds, issued to the Evansville, Carmi & Paducah Railroad Company, that they were issued "by virtue of a resolution of said City Council, passed May 23, 1870," put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms?

3. Do the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, as against a bona fide purchaser for value of such bonds, estop the City of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly

setting forth the company in which stock is to be taken and the number and amount of shares to be subscribed?

4. Under the recital in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company, is a bona fide purchaser for value, put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of the City of Evansville who are freeholders of the city, had been presented to the Common Council, before that body had subscribed for stock in said railroad company?

5. Is a bona fide purchaser for value of the bonds issued to the Evansville, Carmi & Paducah Railroad Company, charged by the recital in said bonds, with notice that they were issued in pursuance of an invalid act, and in pursuance of an election thereunder; or had such a purchaser a right to assume, from the recital, that the pre-requisites of both the valid act and the invalid act had been observed by the Common Council before the issuance of such bonds?

JAS. G. JENKINS,
JOHN H. BAKER,
WM. H. SEAMAN.

QUESTIONS.

FIRST.

Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson & Nashville Railroad Company, that they were issued in "pursuance of an Act of the Legislature of the State of Indiana, and ordinances of the City Council of said city passed in pursuance thereof," put a purchaser upon inquiry as to the terms of the ordinances, under which the bonds were issued?

ARGUMENT.

In the statement of facts made by the Court below in this case, the defendant in error is found, and admitted to be a *bona fide* holder of the coupons involved in this suit, concerning which the above question arises. *See statement of facts, supra.*

If he is a *bona fide* holder, then the Court below admits that there was lawful power granted by the Legislature to the City of Evansville to issue the bonds, coupons from which are involved in this suit. For this Court has held

that there could be no *bona fide* holding of negotiable securities of this class, where there was no Legislative power to issue them.

Mark v. Fulton county, 10 Wall, 677.

Commissioners of Douglas county v. Bolles, 94 U. S. 104.

It has now become a primary principle in this class of litigation, that the *bona fide* purchaser or holder of negotiable securities, is in law bound only to ascertain that the legislative power to issue his bonds and coupons had been granted the public corporation, by which they were issued, and that the public corporation issuing them is bound in law to see that the legislative power granted it is legally executed.

Dillon on Munc. Corps., Vol. 1, 4th Ed., p. 588.

Marcy v. Township of Oswego, 92 U. S., 639.

Von Hostrop v. Madison City, 1 Wall, 297.

Pana v. Bowler, 107 U. S., 539.

This Court say, in *Commissioners vs. Bolles, 94 U. S., 109*: "Behind such recitals, as we have seen, a *bona fide* holder for value paid is bound to look for *nothing* except legislative authority given for the issue of municipal bonds to railroad companies. He is not required to examine whether the conditions upon which such authority may be executed have been fulfilled. He may rely upon the decisions made by the tribunal selected by the Legislature."

Oregon v. Jennings, 119 U. S., 74.

The question is answered when it is decided whether these ordinances were any part of the power granted by the Legislature to the City of Evansville to issue the bonds, coupons from which are in controversy in this case.

If these ordinances *were the power*, the defendant in error, the *admitted bona fide holder* of the coupons, would be put upon inquiry as to the terms of the ordinances. But, if they are only *the means of executing the legislative power* granted the corporation, their terms, in law, are no concern of his, nor is he put upon inquiry as to what those terms are.

Humboldt v. Long, 92 U. S., 642.
Pana v. Bowler, 107 U. S., 539.

The language of the question would seem to admit of no doubt on this subject. That language is a part of the recitals in the bonds. The recitals admit that the bonds were issued *in pursuance of an act of the Legislature of the State of Indiana*. This Court has held, that the words *in pursuance of an act, imports* full compliance with all the demands of the act.

Bonham v. Needles, 103, U. S. 648.

"The recitals in the bonds import a compliance with all of the provisions of the acts of the assembly under which they were issued."

Harter v. Kernochan, 103 U. S., 570.

And further the recital says: "*And ordinances of the city council of said city passed in pursuance thereof.*" That is

in accordance with, or to carry into effect, or to execute the legislative power contained in the act.

This power, granted to all municipal corporations, by ordinances to put into execution all the legislative power granted the city, was a general power given in its charter acts by means of which only could it use its powers.

This power of acting by ordinances and resolutions had been exercised long before these bonds were issued and ever since it had an existence, and the city could not exist or use its granted powers in any other way.

Concerning the questions at issue in this case the ordinances referred to conditions precedent to the issue of the bonds, such as the calling and the holding of the elections, the terms of the subscription and the bonds, and the issue and delivery of them. All of these were but incidents in the exercise of the power, and were not *the power itself*. Under the law merchant and the repeated decisions of this Court, the *bona fide* purchaser or holder of these bonds and coupons was no more bound to inquire into the terms of these ordinances than any other ordinances of the city, concerning any other subject of city legislation.

County of Clay v. Society for Savings, 104 U. S., 589.

Having ascertained that the legislative power had been granted the city to issue his bonds and coupons, the defendant in error, *the admitted bona fide* holder of the coupons in controversy, had a legal right to rely upon the recitals on the bonds, made by the corporate officials, whose legal duty

it was to determine the facts recited, *that all the precedent conditions had been complied with* that were necessary to carry into effect the legislative power granted.

Lynde v. The County, 16 Wall 6.

Town of Coloma v. Eaves, 92 U. S. 484.

Commissioners v. January, 94 id. 202.

Commissioners v. Bolles, id. 104.

County of Warren v. Marcy, 97 id. 96.

When the legislative power has been granted, the legal duty of the municipal corporations is to see that it is lawfully executed, if executed at all, or suffer the consequences. The *bona fide* holder of its bonds and coupons cannot possibly be made responsible for mistakes, fraudulent action, or negligence of any or all of its officials, acting within the scope of their official powers in the execution of the legislative powers granted it.

St. Joseph v. Rogers, 16 Wall 644.

Pana v. Bowler, 107 U. S. 541.

Oregon v. Jennings, 119 id. 104.

Insurance Co. v. Bruce, 105 id. 328.

The legislative act granted the power to issue the bonds, was the city charter dated January 27, 1847, or the act of March 11, 1867, as claimed by the Court below in their statement of facts, while the ordinances were dated on or about April, 1868. Neither the bonds, nor their maker, anywhere

claim that there was *any power* in the ordinances or resolutions of the city council. They were only the necessary means for the execution of the power. The recital is coextensive with the charter act of January 27, 1847, and does not refer in any way to *any other act of the Legislature.* The language is: "*Made in pursuance of an act of the Legislature of the State of Indiana, and ordinances of the city passed in pursuance thereof.*" *See copy of bond, supra.*

This language imports full compliance with all that is required by the legislative act, or the ordinances, by the uniform decisions of this Court on that subject.

Harter v. Kernochan, 103 U. S., 562.

Bonham v. Needles, id. 648.

Pana v. Bowler, 107 id. 539.

It is a doctrine always admitted that no public corporation has any power, for any purpose, except what is granted it by the Legislature,. It is the creature of the Legislature. It is born, lives and dies in accordance with the will of the Legislature. The city has therefore no power whatever to issue these bonds, except what is granted by the Legislature. The only Act referred to in the recitals on the bonds, must be that of January 27, 1847, and that act must therefore contain the legislative power to issue the bonds, and all the ordinances, or resolutions, of the city council, are but incidents in, or means of executing this power. The Act of 1867 was only amendatory of the Act of 1847, and conferred

no power. It was only a direction as to the exercise of the power contained in the Act of 1847.

Humboldt v. Long, 92 U. S., 642.

In the Humboldt case just cited, this Court makes the distinction between *the power* granted by the Legislature, and *the exercise of that power* by the public corporation. It says that the calling and holding of the election is no part of *the power*, but only of *the exercise* of this power, and a matter that does not concern the bona fide holder of such negotiable securities as are involved in this suit.

The election is the most important condition precedent to the issue of these negotiable securities, because thereby the electors and taxpayers accept the terms and conditions prescribed by the Legislature in the exercise of the power granted, and accept the debt and promise to pay it. The vote is the contracting of the debt as far as the electors are concerned. All that follows in the making of the subscription to the stock and issuing of the bonds, is merely clerical and official work, and has nothing to do with the legislative power itself.

And yet this Court held, that an election that had been presided over by a moderator chosen by the electors, instead of the official named by the statute, and which the State Court held *void* for that reason, was only an irregularity in the exercise of the power. And the bonds reciting that an election *was held in pursuance of law*, were held valid obliga-

tions of the corporation when in the hands of a *bona fide* holder.

Pana v. Bowler, 107 U. S. 540.

St. Joseph v. Rogers 16 Wall, 644.

Here *all the power*, by the terms of the recitals, is admitted to be in the act of the Legislature of January 27, 1847, and the ordinances for its execution are, by the terms of the recitals, passed "*in pursuance thereof*," or in accordance with the terms of the act itself. If the *bona fide* purchaser has by law only to know that *power* existed for the issue of his bonds, and it is admitted in the recitals that the power is in the legislative act recited, why should he concern himself as to the terms of the ordinances and resolutions of the city, concerning the mere details of the execution of his bonds, which the city, in law, is legally bound to execute.

Marcy v. Oswego, 92. U. S. 641.

Bonham v. Needles, 103 U. S.

Harter v. Kernochan, id. 562.

In *St Joseph v. Rogers, 16 Wall, 659*, this Court say: "Such a power is frequently conferred, to be exercised in a special manner or subject to certain regulations, conditions, or qualifications; but if it appears that bonds issued, show by their recitals that the power was exercised in the manner required by the Legislature, and that bonds were issued in conformity with those regulations, and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect, *will not constitute a defense* to the cor-

poration in a suit on the bonds, or coupons, if it appears that it was the sole province of the municipal officers, who executed the bonds, to decide whether or not there had been an antecedent compliance with the regulations, conditions, or qualifications, which it is alleged was not fulfilled."

Marcey v. Oswego, 92 U. S., 641.

The last quotation is copied by *Dillon on Mun. Corps., Vol. 1, 4th Ed. p. 588*, as the embodiment of the law on this subject.

In *St. Joseph v. Rogers, supra, p. 658*, the Court say: "The instruction presents the proposition, that *the recitals in the bond protect the bona fide holder for value* against irregularities or erroneous conclusions of the officers in regard to the election held, which might impeach the bonds in the hands of parties with notice." *Citing—*

Knox v. Aspinwall, 21 How. 545.

Moran v. Miami County, 2 Black, 722.

Mercer County v. Hackett, 1 Wall, 83

Gelpecke v. City of Dubuque, id, 175.

Von Hostrop v. Madison City, id. 29.

Meyer v. Muscatine, id. 384.

Supervisors v. Schenck, 5 id. 772.

Major v. Lord, 9 id. 414.

In *Von Hostrop v. Madison City, 1 Wall, 297*, the Court say: "As we have seen, the bonds signed by the mayor and clerk of the city, recite on the face of them that they were

issued by virtue of an ordinance of the common council of the city, passed Sept. 2, 1852. *This concludes the city as to any irregularities that may have existed in carrying into execution of the power granted to subscribe the stock, and issue bonds, as has been repeatedly held by this Court.*"

Marcey v. Oswego, 92 U. S., 638.

Harter v. Kernochan, 103 id. 562.

Pana v. Bowler, 107 id. 539.

In *Pana v. Bowler, supra*, this Court say: "*This Court has again and again decided that if a municipal body has lawful power to issue bonds, or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constitutional body, the holder in good faith has the right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds by the authorities, whose primary duty it is to ascertain it.*"

Lynde v. The County, 16 Wall., 6.

Coloma v. Eaves, 92 U. S., 484.

Commissioners v. Bolles, id. 104.

County of Warren v. Marcey, 97 id., 96.

In *Commissioners v. January, 94 U. S., 205*, this Court say: "They (the commissioners) were constituted a tribunal for the adjustment of all questions touching the subject. They were clothed with the power, and charged with the duty to decide them. No appeal or review was provided for. Their

issuing the bonds was the reflex and embodiment of their judgment, that it was proper so to do. It implies a prior determination to that effect. The bonds recite that they were issued in conformity to law, and in pursuance of the election held on the 6th of April, 1869. It is true they refer to the wrong statute; but *falsa demonstratio non nocet*, the bad does not hurt the good. The act of the commissioners was the act of the county, and the county is conclusively bound by what they have done. As between the county and a *bona fide* holder, no question involving the infirmity of the securities can be raised. The principle of estoppel applies, and it precludes the obligor from interposing such a defense. * * * Taking and holding the certificate of stock, issuing and delivering the bonds and paying the interest for a time, cured the defect as to the order for an election, if any such existed. Under the circumstances a *bona fide* taker had a right to presume that everything had been done properly, which was necessary to the validity of the bonds. When this suit was instituted, the objections which have been made were too late. *The views we have here expressed have been repeatedly sustained by the adjudications of this Court.*" *Citing:*

Supervisors v. Schenk, 5 *Wall.*, 772.

Olcott v. Supervisors, 16 *id.*, 698.

City of Lexington v. Butler, 14 *id.*, 283.

Pendleton County v. Wing, 13 *id.*, 298.

Meyers v. Muscatine, 1 *id.*, 385.

Knox v. Aspinwall, 21 *How.*, 544.

Lynde v. The County, 16 Wall., 6.

St. Joseph v. Rogers, id., 644.

Pine Grove v. Talcott, 19 id., 666.

In the case at bar the bonds and coupons were signed by the mayor and attested by the clerk of the city under the corporate seal of the City of Evansville, and there can be no possible doubt but that they were the officials designated by the law, and their position to determine the fulfillment of any and all conditions precedent necessary under the law to make valid the bonds they issued, and make the recitals of their determination of such facts so found upon the bonds.

If it was the duty of those officials to make the recitals, then under all decisions of this Court *the city is bound by the recitals.*

Von Hostrop v. Madison City, 1 Wall, 297.

If the city is bound by the recitals, the *bona fide* purchaser and holder of the bonds is certainly not bound to inquire into and know the terms of the ordinances, by means of which as shown above, the legislative power was executed, and which by their terms show they were passed in pursuance of the act that granted the power, the act of January 27, 1847, for the subscription to the stock and the issue of the bonds.

The defendant in error is an admitted *bona fide* holder of the coupons. He was bound to ascertain only that legislative power existed for the issue of his bonds and coupons.

This he found in the charter act of January 27, 1847, recited on the bonds as the authority for their issue. Neither the city council nor its officials had any power whatever, to issue the bonds, except as ordered and authorized by the Legislature. The Legislature can only act through its statutory enactments, and never through the ordinances or resolutions of city councils, or corporate official boards. The ordinances could, therefore, only refer to the details of the bonds, or the means of executing the power given by the Legislature to issue the bonds and coupons.

Rogers v. Burlington, 3 Wall. 654.

Van Hostrop v. Madison, 1 id. 297.

In *Rogers v. Burlington, 3 Wall. 654*, this Court say: "*Power to issue the bonds being shown, the municipal corporation, as against bona fide holders for value is estopped to deny that the power was properly executed.*"

In the case at bar there is ample power for the issue of these bonds in the act of January 27, 1847. And more, the Court below admits that there was legislative power. Where it finds as a fact that the defendant in error is a *bona fide holder* since as shown above, there can be no *bona fide* holding where there is no legislative power to issue the bonds.

After all that can possibly be said by the counsel for plaintiff in error, the legislative power to issue the bonds existed. If there was any thing, or condition precedent, mentioned in the ordinances which had not been done or complied with, it was not essential in law that the *bona fide*

purchaser of these bonds should know it, or be put upon inquiry as to what the ordinances contained inasmuch as any precedent condition not complied with contained in the ordinances or resolutions of the city, would only be *an irregularity in the exercise of the power.*

This Court has always held that any irregularity in the exercise of the legislative power granted to the corporation, would not invalidate bonds in the hands of a *bona fide* holder.

Rogers v. Burlington, 3 Wall 654.

Pana v. Bowler, 107 U. S., 539.

Van Hostrop v. Madison City, 1 Wall. 297.

QUESTION.

SECOND.

Does the recital in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company, that they were issued "*by virtue* of a resolution of said city council, passed May 23, 1870," put a purchase upon inquiry as to the terms of that resolution and charge him with knowledge of the terms?"

It seems to us, with all due respect for the Court below, the question as above certified is greatly misleading, as it leads to the conclusion that the resolution of May 23, 1870, *was the source of power, and all the power there was for the issue of the bonds.* It seems to us that *all the recitals as to the power should have been certified,* and not a brief extract of

them, and that, too, referring only to the exercise of the power, and not to the power itself. As shown in discussing the first question, the city has no power to issue bonds by resolutions or ordinances, and they are of service only as a means of executing the power granted by the Legislature. Would it not have been more just to the *bona fide* purchaser of the bonds and for the city to ask this Court to pass upon the legal effect of all the recitals that appear upon the bond? The *bona fide* purchaser has a right to rely upon *all the recitals* on the bonds, and the city is bound by all recitals made by its duly authorized officials within the scope of their power.

We therefore ask this honorable Court in passing upon question second, as certified above, to consider *all the recitals upon the bonds*, as they must be considered as a whole in their legal effect.

The recitals in full are as follows:

"By virtue of an act of the General Assembly of the "State of Indiana, entitled, 'An act granting to the citizens "of the town of Evansville, in the County of Vanderburgh, a "city charter,' approved January 27th, A. D. 1847, and by "virtue of an act of the General Assembly of the State of "Indiana, amendatory of said act, approved March 11th, 1867, "conferring upon the city council of said city, power to take "stock in any company authorized for the purpose of making a "road of any kind leading to said city; and by virtue of the reso- "lution of said city council of said city, passed October 4th,

"1869, ordering an election of the qualified voters of said "city upon the question of subscribing three hundred thou- "sand dollars to the capital stock of the Evansville, Carmi "and Paducah Railroad Company, and said election, held on "the 13th day of November, 1868, resulting in a legal ma- "jority in favor of such subscription, and by virtue of a "resolution of said city council, passed May 23d, 1870, order- "ing an issue of the bonds of the City of Evansville (of "which this is part), to an amount not to exceed three hun- "dred thousand dollars, bearing interest at the rate of 7 per "cent. per annum, for the purpose of paying the subscrip- "tion as authorized above." *See copy of the bond, supra.*

In those recitals the legislative power is referred to as in the city charter of January 27, 1847, and the amendatory act of March 11, 1867, and the resolution of October 4, 1869, ordering the election, and the resolution of May 23, 1870, ordering the issue of the bonds "*for the purpose of paying the subscription as authorized above.*"

This language clearly indicates that the legislative power existed for the issue of these bonds *before this* resolution of May 23, 1870, *was passed.* That it existed, and was granted in the two acts recited on the same bonds, the act of January 27, 1847, and the amendatory act of March 11, 1867. It therefore had nothing to do with the legislative power granted to make the subscription, but only as a means of carrying it into effect. A contract was made that could have been enforced and a debt created that could have been collected when the election was held November 13, 1868.

The formal making of the subscription upon the books of the railroad company for its stock was only incidental clerical work to carry into effect the vote of the electors, and the issuing of the bonds under the resolution of May 23, 1870, was not the creating of the debt, nor the contract, it was only formulating the contract, and the bonds were only evidences of the debt. "*The power to subscribe carried with it authority to issue bonds for the sum subscribed, and the subscription being valid, the bonds are equally so.*"

Moultrie County v. Savings Bank, 92 U. S., 632.

Nugent v. Supervisors, 19 Wall, 241.

If we are correct in this, as already shown above in the argument under question FIRST, the *bona fide* purchaser is *not put upon inquiry as to the terms of that resolution, nor is he charged with knowledge of its terms.* For the reason that it does not refer to the legislative power, but is simply a means of the exercise of the power.

Supervisors v. Schenck, 5 Wall, 783.

Bissell v. City of Jeffersonville, 24 How., 287.

Zane v. Cairo City, 149 U. S., 122.

If the *bona fide* holder is to be charged with knowledge of the resolution of May 23, 1870, and to be put upon inquiry as to its terms, why not demand that he should know the terms of the resolutions of October 4, 1869, ordering the election. They are both introduced by the same words, *by virtue of.* And yet this Court has held, in *Humboldt v. Long, 92 U. S., 642*, that *the election* does not confer power, and all concerning it is only

an exercise of the legislative power. It is an expression on the part of the electors of the corporation of their desire and intention to accept and use the legislative power granted to make the subscription and issue the bonds the evidence of the debt so contracted.

The city officials, in the language they use, clearly distinguish and discriminate between the power so given in the two legislative acts and the two resolutions of the city, passed in the exercises of the power, *in stating what the resolutions were passed for.* That of October 4, 1869, ordering the election, and that of the 23d of May, 1870, ordering the issue of bonds. They distinctly state in the recitals that the bonds are to be issued *for the purpose of paying the subscription as authorized above.* That is authorized by the two above recited acts on the face of the bonds, the acts of January 27, 1847, and the amendatory act of March 11, 1867. The city officials do not claim any power to issue bonds, only to execute legislative power granted. Surely its decisions and intentions on this subject are of some consideration.

Zane v. Cairo City 149 U. S., 141–142.

Town of Venice v. Murdock, 92 U. S., 498.

This issue of bonds were of the same class as those from which the first question certified arose, to-wit, railroad aid bonds. They were issued to different railroad companies, but were issued under the same acts of the Legislature and by the same city council and city officials. We therefore think that all that we said above as to question first is ap-

plicable to question second; and that the *bona fide* purchaser or holder of these bonds having ascertained that there was ample legislative power for the issue of these bonds in the acts of January 27, 1847, and of March 11, 1867, *he was not bound by law to know, or inquire as to the terms of the resolution of May 23, 1870*, because by its own terms it shows it was passed for the purpose of carrying into effect a power granted it in above acts of the Legislature. That it had nothing whatever to do with the power itself, and only with the execution of the power. The Court is respectfully referred to cases cited under question first in proof of this position.

Town of Venice v. Murdock, 92 U. S., 494.

Humboldt v. Long, 92 id., 644-645.

QUESTION.

THIRD.

Does the recitals in the bonds issued to the Carmi and Paducah Railroad Company, as against a bona fide purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued for stock subscribed upon a petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken and the number and amount of shares to be subscribed?

This question, we think, must be answered in the affirmative, for the reason that it refers to the *exercise of the*

power and *not the power itself*, as shown above. It is only a condition precedent to the full exercise of the power.

Von Hostrop v. Madison City, 1 Wall, 291.

Also for the reason that the recitals admit that an election was ordered by the city council October 4, 1869, and held November 13, 1869, resulting in a legal majority of the electors in favor of such subscription and the issue of the bonds. The election was regularly called and held, and if a petition of two-thirds of the residents of the city, who are freeholders of the city, distinctly setting forth *the company* in which stock is to be taken, and the *number* and *amount of shares* to be subscribed, was ever a necessary prerequisite to the election, it was certainly substantially complied with by the vote, which is admitted was taken November 13, 1869, and resulted in a majority of the electors voting to *subscribe $300,000 of stock to this very railroad by name, to be paid for in bonds of the city.*

This election was ordered and held by the proper city officials and the result announced in the recitals on the bonds. If there was any failure in the call or notice of this election, or having any petition with two-thirds of the freeholders signing the same, they were only irregularities in the execution of the power, and cannot in any way affect the *bona fide* purchaser or invalidate his bonds.

All such defects, if there were any, in the execution of the power, were cured by the election, the subscription and the issue of the bonds.

Pana v. Bowler, 107 U. S.

This precedent condition of two-thirds of the freeholders *is not a limitation of the power of the city to take stock*, but simply refers to the manner of bringing the matter before the city council for the execution of the power.

Brooklyn vs. Ins. Co., 99 U. S., 362.

Insurance Co. v. Bruce, 105 id. 328.

Grand Chute v. Winegor, 15 Wall, 355.

East Lincoln v. Davenport, 94 U. S., 801.

Moultrie County v. Savings Bank, 92 id., 631.

Walnut v. Wade, 103 id., 983.

The vote was very large in favor of the proposition, being 1,003 votes for the proposition to 138 against it. On this subject Judge Woods says, in *Moulton v. City of Evansville, 25 Fed. Rep., 388:* "From the exhibits made a part of the declaration it appears that the voters of the city voted with great unanimity in favor of subscribing to the stock of the respective railroad companies. The majority in each instance being so large as to make it probable, if not quite certain, that the requisite *two-thirds* of resident freeholders had voted in favor of the subscription. It appears, too, that the proposition submitted to the voters contained, in substance, the statement and formalities necessary to a proper petition under the act of 1847; and if in fact the proper number of freeholders voted favorably, there was nothing more than a formal failure to comply with the law. *The substance was there.*"

This certified question it seems to us, comes exactly within the rule of this Court laid down in the case of *Marcy v. Oswego Town, 92 U. S., 640,* in which this Court say: "The board was to order the election, if certain facts existed, and only then. It was required to act if fifty freeholders, who were voters of the township, petitioned for the election; if the petition set out the amount of stock proposed to be subscribed; if that amount was not greater than the amount to which the township was limited by the act; if the petition designated the railroad; if it pointed out the mode and terms of payment. Of course the board, and it only, was to decide whether these things precedent to the right to order the election were actual facts. No other tribunal could make the determination, and the members of the board had peculiar means of knowledge beyond what any other person could have. Moreover these decisions were to be made *before they acted, not after the election,* and the bonds had been issued. The *order for the election then involved* a determination by the appointed authority that the petition for it was sufficiently signed by fifty freeholders who were voters; that the petition was such a one as was contemplated by the law; and that the amount proposed by it to be subscribed was not beyond the limit fixed by the Legislature. So, also, the subsequent issue of the bonds containing the recital above quoted, that they were issued, '*by virtue of* and *in accordance with*' the legislative act '*and in pursuance of* and *in accordance*' with the vote of '*three-fifths* of the legal voters of the township,' was *another determination,* not only of the result of the popular vote, but that all the facts ex-

isted which the statute required, in order to justify the issue of the bonds." * * * "These are all extrinsic facts, bearing not so much upon the authority vested in the board to issue the bonds, as upon the question *whether that authority should be executed.* They are all, by the statute referred to the inquiry and determination of the board, and *they were all determined before* the bonds and coupons came into the hand of the plaintiff. *He was, therefore, not bound when he purchased to look beyond the act of the Legislature and the recitals, which the bonds contain.*"

The above case exactly covers the *third question* certified by the Court below, and now under consideration. The case at bar is even stronger than the above, for the city council and its officials are a continuous board appointed by the charter act of the Legislature to determine all such questions, by ordinances and resolutions, in the exercise of all its powers, whereas a public corporation, a county or town, or a specially appointed board, to act on such occasions, have more limited powers of action.

We know no decision of this Court which is opposed to the above decision.

We cite *an Indiana case*, which we think is exactly analogous to the case at bar. It is the case of *Von Hostrop v. Madison City, supra, 1 Wall, 297.* The syllabus is *p. 291*: "Where authority is granted to a city to take stock in a road, *provided* the act be 'on the petition of two-thirds of the citizens,' this proviso will be presumed to have been complied

with where the bonds show, on their face, that they were issued *by virtue of* an ordinance of the council of the city making the subscription. The bonds being in the hands of *bona fide* holders for value."

Again, on p. *295, supra*, this Court say: "The city council was the proper judge, whether or not the required number of resident freeholders had petitioned for a subscription to the stock of the company to which the bonds were issued," *Citing—*

Bissell v. The City of Jeffersonville, 24 How., 287, an Indiana case.

The Evansville, etc., Railroad Company v. The City of Evansville, 15 Ind., 395.

Commissioners of Knox Co. v. Aspenwall, 21 How., 539.

Again in the *Von Hostrop case, supra*, p. 297, the Court say: "As we have seen the bonds signed by the mayor and clerk of the city, recite on the face of them that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1852. *This concludes the city, as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this Court.*"

As to the binding effect of recitals on bonds, in the exercise of an existing legislative power, we cite further—

Clay County v. Society for Savings, 104 U. S., 586.

Coloma v. Eaves, 92 id., 484.

Commissioners of Douglas county v. Bolles, 94 id., 104.

Commissioners of Marion County v. Clark, id., 278.

County of Warren v. Marcy, 97 id. 96.

Pana v. Bowler, 107 id., 529.

Bissell v. Jeffersonville, 24 How., 287.

Cairo v. Zane, 149 U. S., 142.

QUESTION.

FOURTH.

"Under the recitals in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company, is a bona fide purchaser of value, put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of the city of Evansville, who are freeholders of the city, had been presented to the common council before that body had subscribed for stock in that railroad company?"

We think, under question third, we have fully shown that under the recitals, which are very full on the bonds issued to the Evansville, Carmi & Paducah Railroad Company, a *bona fide* holder of the bonds *is not* put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of the city of Evansville, who are freeholders of the city, had been presented to the common council before that body had subscribed for stock in said railroad company.

It is simply the same as question third, in another form, as *to the effect of recitals upon bonds*, where the existence of the legislative power to issue them is admitted.

It is a question of fact, and not of law, whether the petition was signed by the proper number of residents and properly filed. The city, its council and officials, *were alone* the proper parties to ascertain that fact, and the *bona fide* purchaser of its bonds had nothing whatever to do with the question under the recitals of his bonds. The recital is that there was a resolution of the city council, passed October 4, 1868, ordering the election, and another stating that such election was held November 13, 1868, resulting in a legal majority of the electors in favor of the subscription, and another resolution of the city council, passed May 23, 1870, ordering the issue of the bonds. Here are *three determinations* of this question by the parties charged with its decision. Twice by the council and once by the electors. There could hardly be anything more added to what was actually done, and all this *recited* on the bonds as to the exercise of the power, in addition to the recitals of the acts of the Legislature granting the power. If ever bond were good, these ought to be.

THE DOCTRINE SUMMARIZED.

Perhaps the best statement of the rule, in cases where there are precedent conditions and the value of recitals, is found in the case of *Town of Coloma v. Eaves*, *92 U. S.*, *484*, decided at the October term, 1875.

This Court there say: "Where, by legislative enactment, authority has been granted to a municipality, or to its

officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only upon some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the enactment that the officers of the municipality were invested with power to decide whether that condition has been complied with, *their recitals that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.*"

Lynde v. The County of Winnebago, 16 Wall, 13.

St. Joseph Tp. v. Rogers, 16 id., 644.

Bissell v. Jeffersonville, 24 How. 287.

Van Hostrop v. Madison City, 1 Wall, 291.

Mercer County v. Hackett, id., 83.

Pendleton v. Arny, 13 Wall, 297.

In the case of *Moulton v. City of Evansville, Vol. 25, Fed. Rep., 382*, covering these same issues of bonds and exactly the same questions now certified to this court, Justice Woods, in holding valid both issues of the bonds in a very carefully prepared opinion, quotes the above rule with approval, *p. 387, supra.* We especially invite the attention of this Court to that case and numerous citations fully sustaining the doctrine.

The same rule is sustained in *Cairo v. Lane, 149 U. S., 141*, October term, 1892. The Court there go a step further than before, and hold that the corporation is estopped from

denying statements made by the official lawfully appointed to determine the facts, stated in a certificate for the registration of the bonds. Such certificate being necessary under the state law to entitle the bonds to registry by the state auditor. The Court say, *p. 141:* "But when the law of the states provides for registry of municipal bonds and a certificate thereof. *Such certificate should be held as sufficient evidence to a purchaser of the existence of those facts upon which alone bonds can be registered.*"

The Federal Court has defined the powers of this very city under its charter act, and construed section 30 of the charter act of 1847, in the case of *Portland Savings Bank v. City of Evansville, 25 Fed. Rep., 389,* and *Post v. City of Evansville, id., 393.* These decisions are carefully prepared, and we think cover every possible question that can arise concerning the bonds and coupons in controversy. As to the powers of the city under the act of January 27, 1847, the Court say in respect to the power: "The right to construct wharves and the power to borrow money, carry with them the right to make the bonds, because that is the ordinary method adopted by corporations to borrow money." *P. 390.*

Thompson v. Peru, 29 Ind.

Again in speaking of recitals the Court say, *p. 391, supra:* "The purchaser of the coupons had a right to rely upon the truth of the recitals in the bonds in respect to the purpose for which they were made, and was not bound to inquire whether or not there had been a diversion from that

purpose, *not to take notice of what the records of the common council show in that respect.*"

"Again, *p. 389*, the syllabus reads: "The purchaser of municipal bonds, which *purport to have been issued for a lawful purpose, may rely on the recital, and is not bound to inquire whether there had been a diversion from that purpose, though it be shown by the municipal records.*"

Moran v. Miami Co., 2 Black, 347.
San Antonio v. Mahaffey, 96 U. S., 313.
Rock Creek Township v. Strong, id., 271.

These same Justices, Baker, Seaman and Jenkins, who certify the question in controversy, have construed the powers of this city under its charter act of 1847, and section 30, in favor of the defendant in error, in the case of *City of Evansville v. Woodbury, Vol. 9, U. S. C. C. of Appls., p. 244.*

In the above case these Justices held that there was legislative power in the charter act of 1847 to issue the bonds. They say, *p. 2*, that the Supreme Court of Indiana, in *Evansville, etc., R. R. Co. v. Evansville, 15 Ind., 395*, in 1860, prior to the date of the bonds and coupons in controversy, construed this same act of 1847, and *prior* to the amendatory act of 1865 and 1867, in the following language, to-wit: "The city was expressly authorized to borrow money to pay for the stock subscribed. The power to borrow money necessarily implies the power to determine the time of payment, and also the power to issue bonds or other evidences of indebtedness." The opinion then adopts the

following expression from *Slack v. Maysville & L. R. R. Co., 13 B. Mow., 1*, viz.: "Moreover, the first act under which the debt was created gave full power to the County Court to provide for its payment, either by taxation or borrowing the money, which, of course, implied the power, as it did the necessity of furnishing some evidence of indebtedness, and the Court might doubtless have issued bonds of the county, in some form, to the lender."

These Justices say further, *p. 3, supra*: It was the fortieth clause of this section which was here construed, while the power to issue the bonds here presented, must be found in the *forty-first clause. The language is the same in each authorizing "to borrow money" in the one to pay for subscription, and in the other for the use of the city.* THERE CAN BE NO DIFFERENCE IN THE RULE TO BE APPLIED.

The interpretation is of the statutory language, and must be held equally applicable to both clauses. A competent judicial construction of a statute enters into and becomes a part of it, as though it had been written in, so far at least as contract rights accruing under it are concerned.

Douglas v. County of Pike, 101 U. S., 677.

Sutherland Stat., Construction, Sec. 319.

"The borrowing of money to pay outstanding indebtedness of the city was clearly a borrowing for the use of the city; and if this ruling of the highest Court of the state must govern here, *the powers to issue the bonds is well shown.* That decision appears to have remained undisturbed, and is

in accord with the doctrine held by that Court. *Dillon Munic. Corporations, Sec. 119:* "It is worthy of note that the Supreme Court of the United States held directly the same construction upon a grant of power, to borrow money for any public purpose." In *Rogers v. Burlington, (3 Wall, 654.) and Mitchell v. Burlington, (4 Wall, 270)*, these decisions were five and six years after that in Indiana, and although they appear to have been overruled in recent years, *they would constitute some justification, if any were needed, for reliance by purchasers upon the Indiana interpretation.*"

"The Federal Courts have maintained a rule from their organization, that in all cases depending upon a state statute, they will adopt and follow the adjudications of the Court of last resort in the state in its construction, when that construction is well settled, and without inquiry as to its original soundness. This rule is founded upon respect for property rights as well as of comity, and had early expression by Chief Justice Marshall, and has been upheld by an unbroken line of decisions. *Polk's Series v. Wendell, 9; Crouch 87. Nesmith v. Sheldon, 7 How., 812. Fairfield v. Gallatin County, 100 United States. 47 Douglas v. County of Pike, 101 U. S., 677.*

Therefore, the recent decisions in *Merrill v. Monticello 138 U. S., 673*, and *Brenham v. German American Bank, 144 U. S., 173, cited* in behalf of plaintiff in error as decisive, *are not applicable.* The rights of the holders of these bonds accrued under the previous interpretations by the Indiana Courts, and while these cases in the Supreme Court establish a rule

for original construction, they do not govern as to the bonds in suit."

Havemeyer v. Iowa Co., 3 Wall, 294.

Gelpecke v. Dubuque, 1 id., 175.

We have quoted extensively from the above decision because, as it appears to us, if they were correct in their decision in that case, how can they waiver or hesitate in the case at bar? Because, if that decision was correct, based upon the ground of a construction of the powers of the city under its charter act of 1847 by the State Supreme Court in the case of *Evansville, etc., Railroad Company v. Evansville, 15 Ind., 395*, in 1860, when the bonds in that case were dated 1878, 1877, and 1881, while the bonds and coupons from which, are involved in the case at bar were dated May, 1868, and December, 1870, they were issued *eight and ten years after the decision in the State Supreme Court of Indiana*, and before the bonds above stated were issued, which those Justices held valid by reason of that decision.

This very identical clause of the charter of the city act of 1847, was construed by that Indiana Supreme Court, under which the coupons in controversy were issued. The Justices in the case of *City of Evansville v. Woodbury, supra*, say, *p. 2:* "The question of the power conferred by this identical section of the charter, was before the Supreme Court of Indiana and a decision rendered in 1860, prior *to all the issues of bonds* here in controversy, and is found in *Evansville, etc., R. R. Co. v. Evansville, 15 Ind., 395.* IT AROSE OUT OF BONDS

ISSUED TO PAY FOR SUBSCRIPTIONS TO STOCK OF A RAILROAD. Construing the grant of power "to borrow money" for such payment, contained in the above cited 40th clause, that Court held as follows: "The city was expressly authorized to bororw money to pay *for stock subscribed.* The power to borrow money necessarily implies the power to determine the time of payment, and also the power to issue bonds or other evidences of indebtedness."

There can, therefore, be no question whatever, but that this decision *refers to railroad aid bonds and covers those in the case at bar.* If it covered wharf, improvement and redemption bonds, and granted power for sustaining their validity, much more so, does that decision sustain the validity of these bonds in the case at bar; because they are *the same kind of bonds passed upon in that case, to-wit, railroad aid bonds issued in payment of subscriptions to the stock of railroad companies, issued under the legislative power of the charter act of 1847.*

QUESTION.

FIFTH.

"Is a bona fide purchaser for value of the bonds issued to the Evansville, Carmi & Paducah Railroad Company charged by the recitals in said bonds, with notice that they were issued in pursuance of an invalid act, and in pursuance of an election thereunder, or had such a purchaser a right to assume from the recitals that the pre-requisites of both the valid and invalid act had been observed by the common council before the issuance of such bonds?"

In answer to the first part of the fifth question, the recitals, in our opinion, *no where charge the bona fide holder with notice that his bonds were issued in pursuance of an invalid act.*

There is nothing whatever in the recitals on either of the issues of bonds to raise the slightest suspicion that either the act of Jan. 27, 1847, or that of March 11, 1867, are for any cause whatever invalid.

But on the contrary, he knew that the State Supreme Court of Indiana had held in the *Evansville, etc. R. R. Co. v. Evansville, 15 Ind., 395;* that there was ample Legislative power in the act of Jan. 27, 1847, for the issue of railroad aid bonds such as his. and that this decision was in full force and effect, and not reversed. when his bonds were issued and became, and was, in law a part of his contract.

Douglas v. County of Pike, 101 United States, 677.

Sutherland Stat. Construction, Sec. 319.

Neither the act of 1865 or that amendatory thereto of 1867 were at all necessary to complete the Legislative power, for the issuance of these bonds. Since the State Supreme Court of Indiana had held that there was ample power for the issue of railroad aid bonds to pay for subscription of stock in railroads, exactly similar to the bonds and coupons now in controversy in 1860, five and seven years before the two acts in controversy were passed by the Legislature. It therefore matters not to the *bona fide* holder, whether either of the acts of 1865, and 1867, were valid acts. He had

a right to rely upon the Legislative power conferred in the charter act of 1847.

The State Supreme Court of Indiana, the three Justices of the U. S. Circuit Court of Appeals in *City of Evansville v. Woodbury, U. S. Cir. Court, of Appeals, Vol. 9, p. 244,* and Judge Woods in *Moulton v. City of Evansville, 25 Fed. Rep., p. 387,* and in *Portland Savings Bank v. City of Evansville, id., 389,* and *Post v. City of Evansville, 393,* have all held that there was ample power for the isssue of these bonds in payment of stock subscribed to railroad companies *under the act of 1847,* and entirely independent of the acts of 1865, and 1867, amendatory thereof.

Judge Woods says, *p. 387, supra,* in *Railroad Co. v. City of Evansville, 15 Ind., 395:* "It was held that a railroad is such a road as is embraced in the terms of the charter (act of 1847), and that instead of borrowing money the city might issue its bonds directly to the railroad company in payment for the stock taken. Under these authorities it seems to me clear that a *bona fide* purchaser of the Evansville, Henderson & Nashville bonds is entitled to protection, the recital being that they were issued 'in pursuance of an act of the Legislature, and ordinances of the city council of said city, passed in pursuance thereof.' There being no other valid act of the Legislature which could have been intended, it must be presumed that references was to the act of 1847. The recital in the other bonds show in explicit terms that they were issued by virtue of the acts of 1847 and 1867, and of an order for an election, an election held, and by virtue

of a resolution of the city council, passed May 23, 1870, ordering the issue of the bonds, etc. The beginning and ending of this recital clearly import a compliance with the law of 1847, unless the meaning is modified by the other parts," *p. 388.* "*But while it is apparent the law of 1847 was not strictly conformed to, it seems probable that there was a substantial compliance.*"

The act of 1847 contained all necessary power to call and hold elections. The amendatory acts of 1865 and 1867 could add nothing to this power contained in act of 1847.

A substantial compliance with the act granting the power is all that is necessary to validate bonds in the hands of *bona fide holders.*

School District v. Stone, 106 U. S. 187.

Mercer County v. Hackett, 1 Wall 93.

Am. and Eng. Encl., Vol. 2, p. 466, Note 6 and citations.

In reply to the latter part of question fifth, we unhesitatingly affirm that the *bona fide* purchaser had a right to assume from the recitals, that the pre-requisites of both the valid and invalid acts had been observed by the common council before the issuance of such bonds.

The recital is *by virtue of both these acts.* If power can be found for the issue of his bonds in either, or both acts cited, the *bona fide* purchaser has a right to presume that all precedent conditions contained in either act were lawfully complied with in the execution of his bonds.

Commissioners v. January, 94 U. S., 205.

Am. and Eng. Encl. of Law, Vol. 2, p. 244d, Note 6 and citations.

Chimquy v. The People, 78 Ill. 572.

All precedent conditions not complied with are presmed to be waived by the issue and delivery of the bonds.

In *County of Randolph v. Post, 93 U. S., 513*, this Court say: "We should unreasonably restrict the rights and powers of a municipal corporation, were we to hold that it did not possess the power to alter its legally made contract by waiving conditions found to be injurious to its interests, or that it could not estop itself like other parties to a contract."

Bigelow on Estoppel, 464.

Moran v. Comm'rs, 2 Black 722.

Zabinskie v. Cleveland, 23 How. 400.

Pendleton v. Amy, 13 Wall, 297.

1 Dillon Mun. Corp., Sec. 375, 383, 385, 398.

EFFECT OF RECITALS GENERALLY.

Citations of authority on the question of estoppel of municipalities denying facts recited upon their bonds.

Where there is authority of law granted to the municipal corporatiion by the Legislature to vote to subscribe for stock in a railroad company, and pay for the same by issuing bonds of the municipality, in a suit to recover on such bonds, between a

bona fide holder for value and the municipality issuing the same, the municipality is estopped from denying facts recited upon the bonds when made by the officials of such municipality, authorized to make such recitals, either by the Legislative act, or by virtue of the authority conferred by the office they hold.

Knox County v. Aspinwall, 21 How., 542. 1859.

Bissell v. Jeffersonville, 24 How., 287. Indiana case.

Moran v. Miami County, 2 Black, 722. Indiana case.

Gelpecke v. City of Dubuque, 1 Wall, 175.

Van Hostrop v. Madison City, id. 291. Indiana case.

Thompson v. Lee County, 3 id. 327.

Rogers v. Burlington, 3 id. 654.

Pendleton County v. Avery, 13 id. 297.

Humboldt v. Long, 92 U. S., 642.

County of Warren v. Marcy, 97 id. 104.

County of Moultrie v. Savings Bank, id. 631.

Coloma v. Eaves, 92 id., 631.

Commissioners v. January 94 id. 202.

Commissioners v. Bolles, 94 id. 104.

Roberts v. Bolles, 101 id. 119.

Wade v. Walnut, 103 id. 693.

Harter v Kernochan, 103 id. 562.

Bonham v. Needles, 103 id., 648.

Pana v. Bowler, 107 id., 529.

Oregon v. Jennings, 119 id., 74.

Cairo v. Zane, 149 id., 122.

Grand Chute v. Winegar, 15 Wall, 379.

In all of the above cases the bonds were held valid in the hands of *bona fide* purchasers *by virtue of their recitals.* The books are full of such cases, and in fact we find no cases to the contrary.

The cases so often cited in this line of litigation, to-wit *Merrill v. Monticello, 130 U. S., 673; Benham v. German-American Bk., 144 id., 173,* and *Franklin Co. v. German Savings Bk., 128 id. 526,* and not applicable to the case at bar, having been decided long after the issue of the bonds and coupons in controversy in this case. *See opinion of Judge Woods in the Circuit Court cited, supra.*

Douglas v. Pike Co., 101 U. S. 677.

Burley v. Rochester Tp., 5 Fed. Rep., 667.

Havermeyer v. Iowa Co., 3 Wall. 294.

The Court below, in their Statement of Facts, p. 7 of this document, are mistaken when they say: "*No such petition was, in fact, in either case, made, or presented to the common council of the city of Evansville.*"

The record shows that there was a petition presented, read, and entered upon the minutes, *Record, p. 17.* It was as follows: "*To his honor, the mayor and common council of the city of Evansville*: Gentlemen—We, the undersigned, taxpayers, impressed with the necessity of immediate action to enable the managers of the Evansville, Henderson & Nashville railroad company to come to, or near, Madisonville and the coal field the present season, respectfully petition your honorable body to pass the accompanying order of election to

take $300,000 stock heretofore voted for under such modifications as to make it more available." Signed by over 60 names.

On the next page the council ordered the issue of bonds on the terms and conditions set forth in the petition, etc." Election notice, see *p. 34, Record.*

In the order for election, *Record, p. 115*, for subscription to stock of Evansville, Carmi & Paducah railroad company, the language is: "To subscribe for and take stock in the Evansville, Carmi & Paducah railroad company to the amount of $300,000 on the terms and conditions and subject to the provisions and stipulations *contained in the petition presented* to the common council on the 4th day of October, 1869, and recorded in the minute book of said council at pages 211 and 212."

There can be no question but that petitions of taxpayers were presented to the common council in both issues of bonds, substantially complying with the legislative demands, as shown from the above record.

ILLINOIS BOND CASES.

The Court below have notified counsel in some five or six cases pending in that Court from Illinois, that they were largely dependent upon the decisions of the questions certified in this case.

We cite a few cases which arose under the laws of Illinois, in which the bonds have been held valid obligations

of the corporations making them *upon their recitals.* Many of the subscriptions to the stock of the railroad companies in these cases were voted *before* the prohibitory amendment of the constitution became effective, July 2, 1870, and bonds were issued *thereafter.*

Supervisors v. Schenck, 5 Wall, 783, decided in *1866.*
Coloma v. Eaves, 92 U. S., 486, " " *1875.*
County of Warren v. Marcy, 97 id. 104, " " *1877.*
Post v. Warren, 97 id 110, " " *1877.*
Brooklyn vs. Ins. Co., 99 id. 363, " " *1878.*
County of Warren v. Portsmouth Savings B., 97 id. 110, 1878.
Roberts v. Bolles, 101 id. 124, " " *1879.*
Bonhan v. Needles, 103 id. 648, " " *1880.*
Harter v. Kernochan, 103 id. 648, " " *1880.*
Pana v. Bowler, 107 id., 529, " " *1882.*
Oregon v. Jennings, 119 id. 93, " " *1886.*
Cairo City v. Zane, 149 id. 122, " " *1893.*
The Eage v. Kohn Case distinguished, 84 Ill. 292.
Insurance Co. v. Bruce, 105 id. 329, " " *1881.*

We might cite many more cases bearing upon the binding effect of recitals made by officials of the corporations issuing bonds within the scope of their authority, but the above will amply show what the rule is under the constitution and the statute laws of Illinois.

We are well aware of the Illinois State Supreme Court decisions often cited to the contrary, and of the case of

Franklin County v. German Savings Bank, 128 U. S. 526, supra but there are none in opposition to the rule above stated, that have not been overruled by this Honorable Court in the Illinois cases cited above. Nor does the *Franklin County case, supra*, conflict with the above rule.

Having, as we think, answered all of the five questions certified by the Court below, we respectfully ask this Honorable Court for such decisions upon them as will cause the Court below to affirm the judgment in favor of this defendant in error in this case.

All of which is respectfully submitted by

GEORGE A. SANDERS,
Attorney for Defendant in Error.

WM. R. BOWERS,
Of Counsel.

Office Supreme Court, U. S.
FILED.
JUN 8 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

THE CITY OF EVANSVILLE, *Plaintiff in Error*,

v.

WILLIAM S. DENNETT, *Defendant in Error*.

No. 8[illegible] 509

ON CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SECOND BRIEF FOR DEFENDANT IN ERROR.

By A. W. HATCH,
Att'y for Defendant in Error.

Carlon & Hollenbeck, Printers, Indianapolis.

IN THE

Supreme Court of the United States.

THE CITY OF EVANSVILLE, *Plaintiff in Error*,
v.
WILLIAM S. DENNETT, *Defendant in Error*.
No. 885.

ON CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SECOND BRIEF FOR DEFENDANT IN ERROR.

15,769.

QUESTIONS CERTIFIED TO THE UNITED STATES SUPREME COURT FOR ANSWER.

1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson and Nashville Railroad Company, that they were issued "in pursuance of an act of the legislature of the state of Indiana, and ordinances of the city council of said city, passed in pursuance thereof," put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued?

2. Does the recital in the series of bonds issued to the Evansville, Carmi and Paducah Railroad Company, that they were issued "by virtue of a resolution of said city council, passed May 23, 1870," put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms?

3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, as against a *bona fide* purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken and the number and amount of shares to be subscribed?

4. Under the recitals in the series of bonds issued to the Evansville, Carmi and Paducah Railroad Company, is a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of the city of Evansville, who are freeholders of the city, had been presented to the common council, before that body had subscribed for stock in said railroad company?

5. Is a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi and Paducah Railroad Company charged, by the recital in said bonds, with notice that they were issued in pursuance of an invalid act, and in pursuance of an election thereunder; or had such a purchaser a right to assume, from the recital, that the pre-requisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?

JAS. G. JENKINS,
JOHN H. BAKER,
WM. H. SEAMAN.

COPY OF BONDS.

"$1,000.00 No.....

"UNITED STATES OF AMERICA.

"City of Evansville, State of Indiana.

"On account of stock subscription in the Evans-
"ville, Henderson and Nashville Railroad Company.
"The city of Evansville, in the State of Indiana,
"promises to pay to the bearer thirty (30) years after
"date the sum of one thousand dollars, at the office of
"the Farmers' Loan and Trust Company, of New
"York, with interest thereon, at the rate of seven
"per centum per annum, payable semi-annually at the
"office of the Farmers' Loan and Trust Company, in
"the city of New York, on the first day of November
"and the first day of May of each year, on present-
"ation and delivery of the interest coupons hereto
"attached. This being one of a series of three hun-
"dred bonds of like tenor and date issued by the city
"of Evansville, in payment of a subscription to the
"Evansville, Henderson and Nashville Railroad Com-
"pany, made in pursuance of an act of the legisla-
"ture of the state of Indiana and ordinances of the
"city council of said city, passed in pursuance thereof.
"The city of Evansville hereby waves all benefit from
"valuation or appraisement laws.

"In testimony whereof, the said city of Evansville
"has hereunto caused to be set its corporate seal, and
"these presents to be signed by the mayor of said city,
"and countersigned by the clerk thereof. Dated the
"1st day of May, 1868.

"Signed WILLIAM H. WALKER,
"*Mayor.*

"A. M. MCGRIFF, *City Clerk.*"

"No..... $1,000.00

"City of Evansville, State of Indiana.

"Evansville, Carmi and Paducah Railroad Company.

"By virtue of an act of the General Assembly of "the State of Indiana, entitled, 'An act granting to the "citizens of the town of Evansville, in the county of "Vanderburgh, a city charter,' approved January 27th, "A. D. 1847, and by virtue of an act of the General "Assembly of the State of Indiana, amendatory of said "act, approved March 11th, 1867, conferring upon the "city council of said city power to take stock in any "company authorized for the purpose of making a "road of any kind leading to said city; and by virtue "of the resolution of said city council of said city, "passed October 4th, 1869, ordering an election of the "qualified voters of said city upon the question of sub-"scribing three hundred thousand dollars to the capital "stock of the Evansville, Carmi and Paducah Rail-"road Company, and said election, held on the 13th "day of November, 1868, resulting in a legal majority "in favor of such subscription, and by virtue of a res-"olution of said city council, passed May 23d, 1870, "ordering an issue of the bonds of the city of Evans-"ville (of which this is a part), to an amount not to "exceed three hundred thousand dollars, bearing in-"terest at the rate of 7 per cent. per annum, for the "purpose of paying the subscription as authorized "above. The said city of Evansville hereby acknowl-"edges to owe and promises to pay to the Evansville, "Carmi and Paducah Railroad Company, or bearer, "one thousand dollars, without relief from valuation "or appraisement laws, payable on the 1st day of De-"cember, A. D. 1895, at the Farmers' Loan and Trust

"Company, in the city of New-York, with interest from "the date thereof, at the rate of 7 per cent. per annum, "said interest payable semi-annually, on the 1st day of "June and the 1st day of December, on presentation "of the proper coupons for the same at said bank. "The faith and credit and real estate revenues, and "all other resources of the said city of Evansville "are hereby solemnly and irrevocably pledged for the "payment of the principal and interest of this bond.

"In testimony whereof, the mayor of the city of "Evansville has hereunto set his hand and affixed the "corporate seal of the said city, and the city clerk of "said city has countersigned these presents, this 1st "day of December, 1870.

"WM. BAKER, *Mayor.*

"WM. HELDER, *City Clerk.*"

ARGUMENT.

In determining the questions submitted to this court in this case, two questions relating to the issuing of bonds such as these are of importance, viz.: First, has the municipality power to issue such bonds, and, second, if it has such power, but some irregularity has attended their issue, what effect will representations of fact, on the face of the bonds themselves, have on their validity where the bonds, as in this case, are negotiable under the law merchant and are held by *bona fide* purchasers, who have bought them, relying upon the facts so recited on their face.

That the bonds are negotiable securities see *Gelpecke* v. *City of Dubuque*, 1 Wall. 175, where the court says: "When the corporation has power, under any circum- "stances, to issue negotiable securities, the *bona fide* holder "has a right to presume that they were issued under the

"circumstances which gave the requisite authority, and "they are no more liable to be impeached for any infirm- "ity in the hands of such holder than any other com- "mercial paper."

"Bonds and coupons like these, by universal com- "mercial usage and consent, have all the equities of "commercial paper."

As to the question of power, there seems to be a growing tendency on the part of courts to deny the power of municipalities to issue such bonds unless the power be given expressly or by clear implication—to this effect are *Kelly* v. *Milan*, 127 U. S. 139; *German Savings Bank* v. *Franklin*, 128 U. S. 526; *Young* v. *Clarendon Tp.*, 132 U. S. 340; *Merrill* v. *Monticello*, 138 U. S. 673; *Brenhan* v. *German-American Bank*, 144 U. S. 173; and *Citizens' Saving, etc., Association* v. *The County of Perry*, decided this term by this court.

These cases are cited and relied upon by plaintiff in error as effecting the question of estoppel, but I submit they all stop with the question of power to issue bonds and do not affect the question of the exercise of that power; they do not go to that point. That the city of Evansville had the power to issue the bonds in suit was clearly decided in *Railroad Company* v. *Evansville*, 15 Ind. 395, where the court says: "The city was ex- "pressly authorized to borrow money to pay for the "stock subscribed. The power to borrow money neces- "sarily implies the power to determine the time of pay- "ment, and also the power to issue bonds or other evi- "dences of indebtedness."

Power to issue bonds being shown and bonds having been issued in professed execution of that power—and so state on their face—and in conformity with the authorizing statutes and the duty thereunder of the officials executing the bonds—there has been no relax-

ation of the rule which protects *bona fide* purchasers who relied upon the truth of the statements so made. The charter of Evansville constituted the common council the tribunal to determine whether or not the conditions precedent to the issuing of the bonds had been complied with, and their statement upon the face of the bonds that they had precludes the city from a denial of that fact.

In *Rail Road Co.* v. *Evansville, supra*, at page 421, the "court says: "In order to give the common council power "to subscribe, it is necessary that a certain number of "persons should have petitioned therefor; but the "common council are to judge of the proportion and "qualifications of the persons petitioning, and their "judgment, in that respect, is conclusive, unless, in- "deed, it may be set aside upon some direct proceeding "for that purpose."

See, also, *Supervisors* v. *Schenck*, 5 Wall. 783. The election to vote on the issue of the bonds was ordered by the county court instead of being ordered by the board of supervisors. The court in that case held: "After the authority has been executed, the stock sub- "scribed, the bonds issued and in the hands of innocent "holders, it was too late, even in a direct proceeding, to "call the power in question, much less can it be called "in question to the prejudice of a *bona fide* holder of the "bonds in a collateral way."

In this instance the common council state on the face of the bonds, that they are issued in "pursuance of" and "by virtue of" (synonymous terms, *vide*, *Independent School District* v. *Stone*, 106 U. S. 183), the acts of the general assembly of Indiana, including, of course, the charter of Evansville of 1847, which required the presentation of a petition by the freeholders of the city. After the council had so decided,

they, and all others, were bound thereby. That they also decided and so recited on the face of the bonds, that other statutes, specifying them, had also been complied with, made no difference even though the other statutes were void. This was held in *Commissioners of Johnson County* v. *January*, 94 U. S. 202. Suit was brought to recover on bonds issued by the county commissioners in aid of the St. Louis, Lawrence and Denver Railroad Company, which bonds upon their face recited "this bond is executed and issued by "virtue of and in accordance with an act of the legis- "lature of Kansas, entitled An act authorizing coun- "ties and cities to issue bonds to railroad companies, "approved February 25, 1868, and in pursuance of "and in accordance with the vote of a majority of the "qualified electors of Johnson, at a regular election, "held on the 6th day of April, 1869."

"The act of February, 25, 1868, was expressly re- "pealed by the act of February 27, 1869, without any "saving clause as to pending proceedings. The elec- "tion was ordered when the law of February 25, 1868, "was in force, but was not held until after the last law "took effect, and it was claimed that the election or- "dered when the former law was in force, not having "been held until the last law took effect, repealing the "existing law, so that all subsequent acts to which "it gave rise were void. Their issue was not author- "ized by the act of 1869, as after its passage no election "was ordered, and the county is not estopped from "contesting their validity, especially when their re- "citals show an absence of legal authority for the 'doings of the board." But the court says: "What- "ever may be the fact, we are satisfied that after the "passage of the act of 1869 all of the proceedings were "in substantial conformity to its requirements. It was

"in force before the election was held and until after the "bonds were issued and delivered. This act, like the "act of 1868, authorized the commissioners to issue the "bonds when the requirement of the law had been com- "plied with. They would thus constitute a tribunal for "the adjustment of all questions touching the subject. "They were clothed with the power and charged with "the duty to decide them. No appeal or review was "provided for. Their issuing the bonds was the reflex "and embodiment of their judgment that it was proper "to do so. It implies a prior determination to that ef- "fect. The fact carries with it this presumption, and "the bonds recite that they were issued in conformity to "law and in pursuance of the election held on the 6th "of April, 1869. It is true they refer to the wrong stat- "ute, but *falsa demonstratio non vocit*. The bad does not "hurt the good. The act of the commissioners was the "act of the county, and the county is conclusively bound "by what might have been done; as between the county "and a *bona fide* holder no question involving the in- "firmity of the securities can be raised. The principle "of estoppel applies and it precludes the county from "interposing such a defense. Taking and holding cer- "tificates of stock, issuing and delivering the bonds, and "paying the interest for a time, cure the defect as to the "order for an election, if any such existed. Under the "circumstances a *bona fide* holder had a right to pre- "sume that everything had been properly done which "was necessary to the validity of the bonds. When this "suit was instituted the objections which have been made "were too late."

So in *Pendleton County* v. *Amy*, 13 Wall. 297. It was claimed that there was no vote to subscribe for the stock. But it was held, "Where they make a subscription and "issue bonds, it may be presumed in virtue of an inno-

"cent purchaser of the bonds, that the conditions which "the law attached to the exercise of the power have been "fulfilled."

So in *Rogers* v. *Burlington*, 3 Wall. 654, where the court says: "Power to borrow money for any public purpose "gives authority to a municipal corporation to borrow "money to aid a railroad company making its road a "highway for public travel and transportation, and as a "means of borrowing the money to accomplish this ob- "ject such municipal corporation may issue its bonds "to be sold by the railroad company to raise the money.

"Power to issue the bonds being shown, the munici- "pal corporation, as against *bona fide* holders of them for "value, is estopped to deny that the power was properly "executed. The rule that a corporation, quite as much "as an individual, is held to fair dealing to other par- "ties, applies with all its force, and we repeat that cor- "porations can not, by their acts, representations or "silence, involve others in onerous engagements, and be "permitted to defeat the claims and calculations their "conduct has superinduced."

So in *Van Hostrop* v. *Madison City*, 1 Wall. 261, an Indiana case, where the court says: "Another objection "taken is, that the proviso requiring the petition of two- "thirds of the citizens, who were freeholders of the city, "was not complied with. As we have seen, the bonds "signed by the mayor and clerk of the city recite, on the "face of them, that they were issued by virtue of an ordi- "nance of the common council of the city, passed Sep- "tember 2, 1852. This concludes the city as to any "irregularities that may have existed in carrying into "execution the power granted to subscribe stock and "issue the bonds, as has been repeatedly held by this "court. Our conclusion upon the whole case is, that "full power existed in the defendant to issue bonds,

"and the plaintiffs are entitled to recover the interest "coupons in question. Even if the case had been "doubtful, inasmuch as the city authorities have "given this construction to the charter, and bonds "have been issued, and in the hands of *bona fide* pur- "chasers for value, we should have felt bound to ac- "quiesce in it." I desire to call attention especially to this, an Indiana case, that, at the time the bonds in suit were issued, was the latest judicial expression on the subject, and was followed by the Evansville council in issuing these bonds.

In *National Life Ins. Co.* v. *The Board*, 62 Fed. Rep. 10, C. C. A. 639, the court, through Judge Sanborn, after reviewing the decisions of this court with great care, states the rule applicable to and conclusive of the case at bar as follows: "Where the municipal body "has lawful authority to issue bonds or negotiable se- "curities, dependent only upon the adoption of certain "preliminary proceedings, and the adoption of those "preliminary proceedings is certified on the face of the "bonds by the body to which the law entrusts the power, "and upon which it imposes the duty to ascertain, de- "termine and certify this fact before or at the time of is- "suing the bonds, such certificate will estop the munici- "pality, as against a *bona fide* purchaser of the bond, "from proving its falsity to defeat them."

It will be observed in many of the cases cited by plaintiff in error that the law provided for the passage of an ordinance and a ratification thereof by the voters; not so here. In this case the law provided that on a petition being filed, the common council should act, they, the common council, being the judges of the sufficiency of the petition; should the law have provided that the council should act, by passing an ordinance, and that such ordinance should be ratified by petition or election, a

different question would arise. In *Post* v. *Pulaski County*, and similar cases relied upon by plaintiff in error, the county court were directed to carry out a certain contract, with conditions specified, which they did not do. Under the Evansville charter, all that was necessary was that a petition be filed with the common council, and if the common council decided it to be sufficient, they then entered into the contract themselves. No conditions were imposed to be ratified by the voters, as in *Post* v. *Pulaski*, *supra* ; all that the common council could do was, upon the filing of the proper petition, which they assert on the face of these bonds was done, for they say they were issued in conformity with the charter of 1847, which provided for the filing of a petition, was to make the subscription and issue the bonds in manner and form as they thought proper and binding. The recitals show that, in addition to complying with the act of 1847, admitted to be valid, they have also, out of abundant caution, complied with other acts claimed to be invalid, and their defense amounts to saying that, because the city has complied with all the laws, both good and bad, and has so stated on the bonds, that the bonds are void. This is clearly a *non sequitur*.

The fact that the council issued the bonds was a finding and judgment that a sufficient petition had been filed, it was the "reflex and embodiment of their judg-"ment that it was proper to do so."

Taking the recitals on the face of the bonds in suit as a whole, as we should do, and applying the ordinary rule of construction, viz.: That in determining the intent and meaning the whole shall be considered, are we not forced to conclude that the city made the recital of facts for the purpose of obtaining money for a lawful purpose, after having decided by its tribunal, for that purpose appointed, and upon ample power

conferred by the charter of 1847, that it was proper to do so, and, having so decided, issued the bonds with other statements of facts, purposely made, that the bonds might find more ready sale? And must we not adopt the rule that the proper construction to be placed on an instrument is what the party making it intended it to mean? which was that all laws had been complied with. If we do not so construe the recitals, we are placed in the position of assuming that the city, in this case, was perpetrating a deliberate fraud upon the purchasers of the bonds.

Hackett v. *Ottawa* and *Ottawa* v. *National Bank*, cited by plaintiff in error, are to the effect that recitals similar to these estop the city from such defense as is interposed here. To the same effect is *Barnett* v. *City of Dennison*, 145 U. S. 135, when carefully examined.

It is adroitly argued by the plaintiff in error that under the charter the common council is alone authorized to issue bonds for the city, and that the bonds in question being signed by the mayor and clerk, the city is therefore not estopped by the recitals on their face. This question was raised in *Railroad Company* v. *Evansville*, *supra*, but the court says: "It was through him "(the mayor), and a very proper person for that pur- "pose, that the common council made their contract." It was not the mayor and clerk who were issuing the bonds, but the council was acting through them, as is, so far as I am informed and the cases disclose, the universal custom. See *Van Hostrup* v. *Madison*, *supra*. There is no question here of the mayor and clerk acting in their official or individual capacity; the *common council* was acting *through them;* the mayor acting merely as an instrument, an amanuensis of the common council.

I can not agree with counsel for the defense that the

act of 1867 was the only act authorizing the city to subscribe for stock in the Evansville, Henderson and Nashville Railway. The charter of 1847 authorized the taking of stock in any "company for making roads to said city." The fact that the road came to the city through Kentucky instead of Indiana, makes no difference. *Vide,*

Moulton v. *Evansville*, 25 Fed. Rep. 384.
Van Hostrup v. *Madison, supra.*

As the court below stated during argument, "might "as well say that New York City with a similar charter "might not aid the Pennsylvania Railway stopping at "Jersey City as it does, were ferries provided, upon "which solid trains were run and by them transported "to New York," as was done in transporting the solid trains from Henderson to Evansville until the bridge was built and the track laid to Evansville.

There is another question still that is, in my judgment proper to be considered in answering the questions submitted, that is absolutely conclusive of the case at bar. Admitting that the amendatory acts, under which the election in this instance is claimed to have been held, to be unconstitutional, and admitting that no proper petition was filed, still the municipality is estopped from setting up such unconstitutionality as a defense, or assailing the validity of the contract entered into. I believe it to be firmly established, as a principle of law, surely in Indiana, that where a municipal or other corporation has received benefits under an unconstitutional law or an *ultra vires*, and, therefore, void contract, such corporation is estopped from denying the unconstitutionality of the law or the validity of the contract.

"Though a contract be in fact wholly *invalid* when

"executed (supposing it not to be prohibited by law as "relating to some illegal transaction), if it be acted "on afterwards by the parties to it as valid, they will, "if *sui juris*, be estopped thereafter to deny its valid- "ity."

Bigelow on Estoppel, 5th Ed. 685.

Mr. Justice Harlan thus states the rule: "A con- "tract not wholly invalid when executed, nor prohib- "ited by law as relating to some illegal transaction, "and which is therefore voidable only, may become, "by the acts of the parties or by long acquiescence, "binding upon them."

Jessup v. *Illinois*, 43 Fed. Rep. 483.

That the city of Evansville had the power to issue bonds under its then charter was decided by the Indiana Supreme Court in *Railroad Company* v. *Evansville*, where Worden, J., said, referring to and construing said clause 40 of the 30th section of the charter before referred to: "The city was expressly authorized to bor- "row money to pay for the stock subscribed. The "power to borrow money necessarily implies the power "to determine the time of payment, and also the "power to issue bonds or other evidence of indebted- "ness."

Railroad Co. v. *Evansville, supra.*
Van Hostrup v. *Madison City, supra.*

That the parties, in this instance, entered into and acted upon the contract in good faith, is established by the facts that the bonds were executed and delivered, the money received for the bonds, the stock delivered to the city, the roads constructed and operated, and the interest on the bonds paid by the city more than fourteen years before default was made. As

the question of good faith enters into all defenses of estoppel it may not be improper for me to say that these roads now constitute a large part of the Louisville and Nashville railroad system, and that the city of Evansville, thus connected with the entire south and west by this great avenue of trade and commerce, has reaped an advantage far beyond the most sanguine expectation. It can not, therefore, be contended that the contract was one "prohibited by law as relating to some illegal transaction," or that it "was wholly invalid when executed," or that it was not acquiesced in by both parties; but, even though it were invalid for want of corporate power, having been fully executed, acquiesced in and acted upon by all parties, it will remain the foundation of the rights acquired by the transaction, and the defense of *ultra vires* will not avail.

Thomas v. *Railroad Co.*, 101 U. S. 71–86.
San Antonio v. *Mehaffy*, 96 U. S. 315.
Vose v. *Cockcraft*, 44 N. Y. 415.
Hitchcock v. *Galveston*, 96 U. S. 351.
Trust Co. v. *Ill. Midland Co.*, 117 U. S. 468.
Nat. Bank v. *Mathews*, 98 U. S. 629.
Railway Co. v. *Flanigan*, 113 Ind. 493.
People v. *Murry*, 5 Hill, 468.

Where a corporation, having enjoyed the fruits of a contract already made, denies, when called to account, the existence of corporate power to make it, the corporation will be estopped.

Railway Co. v. *McCarthy*, 96 U. S. 258.

As was said by Woods, J., in *Moulton* v. *Evansville*, "If it is proposed and determined in a legal way to "take stock in a scheme which any tax-payer thinks "beyond the scope of the power granted to the city,

"he may appeal to the courts for an injunction, and if "omitting to seek this remedy he stands by and per- "mits bonds to be issued, and interest paid on them "for years without question, he, rather than the inno- "cent purchaser of the bonds, should suffer the conse- "quences."

Moulton v. *Evansville*, 25 Fed. Rep. 382.

"The executed dealings of corporations must be al- "lowed to stand for and against both parties when the "plainest rules of good faith require it."

Parrish v. *Wheeler*, 22 N. Y. 494–508.

Indianapolis v. *Gas Co.*, 66 Ind. 407.

In *Daniels* v. *Tearney*, 102 U. S. 415, the court says: "That when a party has availed himself for his own "benefit of an unconstitutional law he can not, in a "subsequent litigation with others not in that position, "aver its unconstitutionality as a defense, although "such unconstitutionality may have been pronounced "by a competent tribunal in another suit. In such "cases the principle of estoppel applies with full force "and conclusive effect." This doctrine has been adopted in its broadest sense as relating to municipal corporations by our Indiana Supreme Court, in a case decided since the argument in this case below, where the court says "one who receives a benefit under an un- "constitutional law is estopped from denying its con- "stitutionality."

Vickery v. *The Board*, 134 Ind. 556.

I have, for the court's convenience, set out this opinion in full in an appendix to this brief.

The following cases are to like effect:

Ferguson v. *Sandram*, 1 Bush (Ky.) 548.
Ferguson v. *Sandram*, 5 Bush (Ky.) 230.
VanHook v. *Whitlock*, 26 (Wend.) N. Y. 43.
Lee v. *Tillotson*, 24 (Wend.) N. Y. 337.
People v. *Murry*, 5 Hill (N. Y.), 468.
Burlington v. *Gilbert*, 31 Iowa, 356.
Railroad Co. v. *Stewart*, 39 Iowa, 267.
State, ex rel., v. *Mitchell*, 31 Ohio St. 592.
Tone v. *Columbus*, 39 Ohio St. 281.

It seems to me, therefore, that the city is estopped from setting up the defenses interposed, and the questions should be answered accordingly.

Respectfully,

ARETUS W. HATCH,
Attorney for Defendant in Error.

APPENDIX.

VICKERY *v.* THE BOARD OF COMMISSIONERS OF HENDRICKS COUNTY.

COFFEY, J.—This was an action by the appellant, in the Hendricks Circuit Court, against the appellee, to enjoin it from levying a tax to pay the bonds issued by the county in payment for a toll road purchased under the provisions of an act of the General Assembly, approved March 8, 1889; Acts of 1889, p. 276.

The court sustained a demurrer to the complaint, and the appellant excepted. This ruling is assigned as error. So much of the complaint as is necessary to present the questions involved in the case is substantially as follows: Upon a proper petition and legal notice, the qualified voters of Marion and Center townships of Hendricks county voted upon the question as to whether the board of commissioners of the county should purchase so much of what was known as the Danville and New Winchester gravel road as was situate in these townships, and convert the same from a toll road into a free gravel road, under the provisions of the act above named. The election was held on the 12th day of November, 1889, and resulted in a majority in favor of purchasing the road. Pursuant to such petition and election the board of commissioners did purchase the road for the agreed price of $5,044.71, and paid for the same in bonds of the county. The company conveyed its road to the county of Hendricks,

and after the completion of the purchase, this action was commenced. It is alleged in the complaint that the board of commissioners is threatening to, and will, unless restrained by the court, levy a special tax upon the property in Marion township for the purpose of paying the proportionate part of the purchase price of the road assigned to that township, which amounts to the sum of $3,301.03. The appellant is a resident voter and tax-payer of Marion township.

It is alleged that the act of the general assembly above referred to is unconstitutional, being in conflict with section 1, article 10, of the constitution of the state, the rate of taxation as fixed by this act not being uniform and equal.

We are of the opinion that the question of the constitutionality of this statute is not presented in such a manner as to require a decision upon the point discussed. Out of the reluctance of the courts to pass upon the question of the constitutionality of a statute has grown the well-known rule that such a question will not be decided unless it is necessary to do so in order to determine the case upon its merits. *Parker* v. *State, ex rel.*, 133 Ind. 178.

In the case of *Gilson* v. *Board, etc.*, 128 Ind. 65, it was determined that there was no difference, in principle, between taxation to construct a free gravel road and taxation to purchase a toll road already constructed, for the purpose of making it free. It was further said that in the passage of this statute the general assembly took into consideration the fact that those living in the immediate vicinity of the toll road had a special interest in making it free, as they would reap an advantage thereby not enjoyed by those residing in a remote part of the county, and for that reason the law imposed upon the people of the township where the road is situate the burden of paying for the same.

In this case the appellant delayed bringing his suit until the toll road had been conveyed to the county and made free, and until the county had paid the purchase price, and the transaction had been fully completed and closed. He had received all the benefits contemplated by the law, and now seeks to avoid payment for such benefits, and asks the aid of a court of equity for that purpose.

One who receives a benefit under an unconstitutional law is estopped from denying its constitutionality.

Ferguson v. *Landram*, 5 Bush (Ky.), 230, 1 Bush, 548.
Travis v. *Ward* (Wash.), 25 Pac. Rep. 908.
Andrus v. *Board, etc.* (La.), 6 S. Rep. 603.
Desmarais v. *Board, etc.*, 42 La. Ann. 799.
Dupre v. *Board, etc.*, 42 La. Ann. 801, 8 S. Rep. 593.
Daniels v. *Tearney*, 102 U. S. 415.

To present the questton of the constitutionality of this act of the general assembly, we think the action should have been commenced before the gravel road company had parted with its toll road, and before the county had paid for the same, or some excuse for the delay should be given.

Where a party with a knowledge of his rights, either by affirmitive acts or by silence, under circumstances where he should speak, encourages or permits others to pursue a course of conduct, or expend money, or alter their condition in contravention of the rights for which he contends, he can not call upon the court afterwards for its summary interference.

Palmer v. *Stumph*, 29 Ind. 329.
Hellenkamp v. *City of Lafayette*, 30 Ind. 192.
Ricketts v. *Spraker*, 77 Ind. 371.
City of Logansport v. *Uhl*, 99 Ind. 531.

It would be manifestly unjust to require Hendricks county to pay for the road, or the owners to lose the purchase price, while the appellant and others, for whose use it was purchased, receive and enjoy all the benefits. Without regard to the question as to whether the statute under consideration is valid or invalid, we think the complaint is bad.

Judgment affirmed.

Office Supreme Court, U. S.
FILED.
JAN 14 1895
JAMES H. McKENNEY,
CLERK.

UNITED STATES OF AMERICA.

IN THE

United States Supreme Court,

OCTOBER TERM, A D., 1894.

No. ~~885~~ 509

THE CITY OF EVANSVILLE,
Plaintiff in Error.

—VS—

WILLIAM S. DENNETT,
Defendant in Error.

MOTION TO ADVANCE UPON THE DOCKET.

GEORGE A. SANDERS,
Attorney for Defendant in Error.

WM. R. BOWERS,
Of Counsel.

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Office Supreme Court, U. S.
FILED.
JAN 14 1895
JAMES H. McKENNEY,
CLERK.

UNITED STATES OF AMERICA.

IN THE

United States Supreme Court,

OCTOBER TERM, A D., 1894.

No. ~~285~~ 509

THE CITY OF EVANSVILLE,
Plaintiff in Error.

—VS—

WILLIAM S. DENNETT,
Defendant in Error.

MOTION TO ADVANCE UPON THE DOCKET.

GEORGE A. SANDERS,
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WM. R. BOWERS,
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UNITED STATES OF AMERICA.

IN THE

United States Supreme Court,

OCTOBER TERM, A. D., 1894.

No......

THE CITY OF EVANSVILLE,
Plaintiff in Error,

vs.

WILLIAM S. DENNETT,
Defendant in Error.

Motion to Advance this cause upon the Docket.

And now comes the defendant, through George A. Sanders, his attorney, and moves this Honorable Court, that the above entitled cause *be advanced upon the Docket*, and set for a hearing, at as early a date as may seem meet and proper

to this Honorable Court, under the peculiar circumstances of the case.

In support of this motion, the following reasons are assigned, to-wit:

First—Justices James G. Jenkins John H. Baker and William H. Seaman, of the Seventh Circuit of the United States Circuit Court of Appeals, have *certified five questions or propositions of law*, arising in this case, on a hearing in that court, and concerning which questions, or propositions of law, the instruction of this Honorable Court is desired by them.

Second—In the notices to the Attorneys of Record, that court states that the following cases which have been argued by carefully prepared briefs, and orally, and have been submitted to that court, are largely dependent upon the decisions of this Honorable Court, on the five questions, or propositions, thus certified to it, to-wit:

Ashman v. Pulaski County.
Woodbury & Moulton v. Shawneetown City.
Seymour v. White County.
Society for Savings v. Saline County.
Wesson v. Saline County.

All of these five cases are upon municipal and public corporation bonds and coupons issued in aid of railroads in the State of Illinois.

Third—The above entitled case was argued orally, and carefully prepared briefs were filed and the cause submitted *April, A. D. 1893* Any further or extended delay in its

APPENDIX.

UNITED STATES OF AMERICA.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, 1894.

Present:—JAMES G. JENKINS, Circuit Judge.
JOHN H. BAKER,
WILLIAM H. SEAMAN, District Judges.

CERTIFICATE TO SUPREME COURT.

The City of Evansville,
Plaintiff in Error,
vs.
William S. Dennett.

This cause came on for hearing on error to the Circuit Court of the United States for the District of Indiana, and having been submitted for decision, certain questions and propositions of of law, among others, are found to be involved in the appeal; concerning which questions and propositions the instruction of the Supreme Court of the United States is desired.

decision will greatly embarass an important line of litigated cases, and tend to extended litigation and disturbance of the public peace and welfare.

WILLIAM S. DENNETT,
Defendant in Error.

BY GEORGE A. SANDERS,
His Attorney.

WM. R. BOWERS,
Of Counsel.

For the convenience of the court, we append a copy of the Statement of Facts, and the five questions, or propositions of law, as certified by the Court of Appeals.

Now, therefore, on this 27th day of November, 1894, it is ordered that the accompanying statement of facts and the following questions be certified to the Supreme Court of the United States for its opinion and instruction, to-wit:

STATEMENT OF FACTS.

The City of Evansville, on May 1, 1868, issued its bonds, bearing date on that day, to the amount, in the aggregate, of the sum of three hundred thousand dollars, in payment of its subscription to the stock of the Evansville, Henderson & Nashville Railroad Company. Each bond was for the sum of one thousand dollars, payable to the bearer thirty years after date, with interest on presentation of the coupons attached, and each bond was of the tenor and effect following:

"$1,000.00 No.....

"UNITED STATES OF AMERICA.

"City of Evansville, State of Indiana.

"On account of stock subscription in the Evansville, Hen-
"derson and Nashville Railroad Company.

"The City of Evansville, in the State of Indiana, pro-
"mises to pay to the bearer thirty (30) years after date the sum
"of one thousand dollars, at the office of the Farmers' Loan
"and Trust Company, of New York, with interest thereon
"at the rate of seven per centum per annum, payable semi-
"annually at the office of the Farmers' Loan and Trust
"Company, in the City of New York, on the first day of
"November and the first day of May of each year, on pre-
"sentation and delivery of the interest coupons hereto at-
"tached. This being one of a series of three hundred bonds
"of like tenor and date issued by the City of Evansville, in
"payment of a subscription to the Evansville, Henderson and
"Nashville Railroad Company, made in pursuance of an
"act of the Legislature of the State of Indiana and ordi-

"nances of the city council of said city, passed in pursuance "thereof. The City of Evansville hereby waives all benefit "from valuation or appraisement laws.

"In testimony whereof, the said City of Evansville has "hereunto caused to be set its corporate seal, and these "presents to be signed by the mayor of said city, and coun- "tersigned by the clerk thereof. Dated the 1st day of May, 1868.

"Signed WILLIAM H. WALKER,
Mayor.

"A. M. MCGRIFF,
City Clerk."

The City of Evansville, on December 1st, 1870, also issued its further series of bonds, amounting in the aggregate to the sum of three hundred thousand dollars, in payment of its subscription to the stock of the Evansville, Carmi & Paducah Railroad Company, each bond being dated December 1st, 1870, for the sum of one thousand dollars, payable to the Evansville, Carmi & Paducah Railroad Company, or bearer, December 1st, 1895, with interest, etc., on presentation of coupons attached, and each bond was of the tenor and effect following:

"Total amount authorized, Three Hundred Thousand Dollars.

"No..... $1,000.00.

"City of Evansville, State of Indiana."

"Evansville, Carmi and Paducah Railroad Company.

"By virtue of an act of the General Assembly of the "State of Indiana, entitled: 'An act granting to the citizens "of the town of Evansville, in the county of Vanderburgh, a "city charter,' approved January 27th, A. D. 1847, and by vir- "tue of an act of the General Assembly of the State of Indi- "ana, amendatory of said act, approved March 11th, 1867, con-

"ferring upon the city council of said city, power to take "stock in any company authorized for the purpose of making "a road of any kind leading to said city; and by virtue of the "resolution of said city council of said city, passed October "4th, 1869, ordering an election of the qualified voters of said "city upon the question of subscribing three hundred thous- "and dollars to the capital stock of the Evansville, Carmi and "Paducah Railroad Company, and said election, held on the "13th day of November, 1868, resulting in a legal majority in "favor of such subscription, and by virtue of a resolution of "said city council, passed May 23rd, 1870, ordering an issue "of the bonds of the city of Evansville (of which this is a "part), to an amount not to exceed three hundred thousand "dollars, bearing interest at the rate of 7 per cent per an- "num, for the purpose of paying the subscription as author- "ized above. The said City of Evansville hereby acknowl- "edges to owe and promises to pay to the Evansville, Carmi "and Paducah Railroad Company, or bearer, one thousand dol- "lars, without relief from valuation or appraisement laws, pay- "able on the 1st day of December, A. D., 1895, at the Farm- "ers' Loan and Trust Company, in the City of New York, "with interest from the date thereof, at the rate of 7 per cent "per annum, said interest payable semi-annually, on the 1st "day of June and the 1st day of December, on presentation "of the proper coupons for the same at said bank. The faith "and credit and real estate revenues and all other resources "of the said City of Evansville are hereby solemnly and ir- "revocably pledged for the payment of the principal and in- "terest of this bond.

"In testimony whereof, the mayor of the City of Evans- "ville has hereunto set his hand and affixed the corporate seal "of the said city, and the city clerk of said city has counter- "signed these presents, this 1st day of December, 1870.

"WM. BAKER,
Mayor.

"WM. HELDER,
City Clerk."

The City of Evansville, by its charter, approved January 27, 1847, has power, conferred upon it by the 40th clause of section 30 thereof, as follows: "To take stock in any chart-"ered company for making roads to said city, or for water-"ing said city, and in any company authorized or empowered "by the Commissioners of Vanderburgh County, to build a "bridge on any road leading to said city, and to establish, "maintain and regulate ferries across the Ohio river from the "public wharves of said city; provided that no stock shall be "subscribed, or taken, by the common council in such com-"pany, unless it be on petition of two-thirds of the residents "of said city who are freeholders of the city, distinctly set-"ting forth the company in which stock is to be taken and the "number and amount of shares to be subscribed; and provided, "also, that in all cases where such stock is taken, the com-"mon council shall have power to borrow money and levy and "collect the taxes on all real estate (either inclusive or exclu-"sive of improvement, at their discretion) for the payment of "said stock."

This 40th clause of section 30 of the original charter of Evansville was, in form, amended by an Act of the Legislature of the State of Indiana, entitled "An Act to amend the 40th Clause of Section 30 of an Act entitled 'An Act to grant to the citizens of the Town of Evansville, in the County of Vanderburgh, a City Charter' approved January 27, 1847, and declaratory of the meaning of the second chapter of the same," (Acts of 1865, p. 76.)

Under the decisions of the Supreme Court of Indiana, this act was repugnant to the Constitution and invalid, in that it did not set out the entire section as amended.

In 1867, the Legislature of the State of Indiana, attempted to amend the act of 1865, above referred to, by an Act entitled "An Act to amend the first Section of an Act entitled 'An Act to amend the 40th Clause of the 30th Section of an Act entitled 'An Act granting to the citizens of the town of Evansville, in the County of Vanderburgh, a City Charter' approved January 27, 1847, and declaratory of the meaning of the 2nd

Section of the same' approved December 21, 1865," so as to authorize the Common Council of the City of Evansville to subscribe for and take stock in the Evansville, Henderson & Nashville Railroad Company, or any other company, or corporation, organized for the purpose of constructing a railroad leading from Nashville, in the State of Tennessee, to a point on the Ohio river at, or near, Evansville, Indiana." (Acts of 1867, p. 121.)

This is an act authorizing subscriptions for stock in the Evansville, Henderson & Nashville Railroad Company, or other railroad companies, by the City of Evansville, when a majority of the qualified voters of the city, who were also tax payers, should vote therefor.

Under the decision of the Supreme Court of the State of Indiana, this latter act is invalid, because amendatory of a prior invalid act.

The bonds in question of both series, were in fact issued in attempted compliance with the Act of March 11, 1867, above, and in the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, referred to.

The ordinances of the City Council of the City of Evansville authorizing the issue of both series of bonds, disclose that they were issued pursuant to an election by the legal voters of the City of Evansville, and do not recite that any petition of resident freeholders of the city was presented to the Common Council, as required by the Charter; and no such petition was, in fact, in either case, made or presented to the Common Council of the City of Evansville.

The defendant in error, William S. Dennett, purchased bonds of both issues, before maturity and for value, and is a bona fide holder thereof. This suit is brought upon matured coupons of both series of bonds.

QUESTIONS.

1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson &

Nashville Railroad Company, that they were issued "in pursuance of an Act of the Legislature of the State of Indiana, and ordinances of the City Council of said city, passed in pursuance thereof," put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued?

2. Does the recital in the series of bonds, issued to the Evansville, Carmi & Paducah Railroad Company, that they were issued "by virtue of a resolution of said City Council, passed May 23, 1870," put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms?

3. Do the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, as against a bona fide purchaser for value of such bonds, estop the City of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be taken and the number and amount of shares to be subscribed?

4. Under the recitals in the series of bonds issued to the Evansville, Carmi and Paducah Railroad Company, is a bona fide purchaser for value, put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of the City of Evansville who are freeholders of the city, had been presented to the Common Council, before that body had subscribed for stock in said railroad company?

5. Is a bona fide purchaser for value of the bonds issued to the Evansville, Carmi & Paducah Railroad Company, charged by the recital in said bonds, with notice that they were issued in pursuance of an invalid act, and in pursuance of an election thereunder; or had such a purchaser a right to assume, from the recital, that the pre-requisites of both the valid act and the invalid act had been observed by the Common Council before the issuance of such bonds.

JAS. G. JENKINS,
JOHN H. BAKER,
WM. H. SEAMAN.

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v.
The United States

LOS NOGALES DE ELIAS

PRIVATE LAND CLAIM

SURVEYED by F. W. OURY.

Total Area 78868.31 Acres

Area in U.S. 25809.05 Acres